Supreme Court, U.S.

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In The
Supreme Court of the United States

JIM GUY TUCKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On the fourth day of trial a juror married a man whose efforts to obtain clemency were thwarted by the Petitioner under circumstances that generated substantial controversy and publicity, and whose family, before and during trial, carried on an inflammatory, public campaign to "get" Petitioner "convicted." Assertions of juror bias and outside influence were rejected.

This case presents the following important questions concerning a defendant's Sixth Amendment and Due Process right to a fair and impartial jury.

1. Whether juror bias must be presumed as a matter of law when the undisclosed, "unusual" and objective facts concerning the personal and vocal animosity of several members of the juror's family towards the defendant would have supported exclusion of the juror for cause?

2. Whether it was error for the court of appeals to hold that an "extreme situation" requiring the presumption of juror bias did not exist simply because the juror was not related to the facts or parties of the case being tried?

3. Whether it is error to require a criminal defendant to prove juror dishonesty, bias, and improper influence, beyond a reasonable doubt?

4. Whether it was error for a court of appeals not to review *de novo* whether a district court applied the proper standard in evaluating factual findings on jury impartiality and improper influence?

5. Whether the clearly erroneous standard of review of factual findings requires a court of appeals to accept a district court's findings that a juror's affirmative answers to post-trial leading questions by the prosecution were credible when those findings conflict with the objective evidence and contradict the juror's other testimony?

6. Whether it was error to refuse to grant a defendant a new trial because a juror's disavowals of bias and improper influence are deemed credible even though the juror's total testimony is internally inconsistent, false and evasive as to material facts, and simply implausible under the totality of the facts and circumstances?

7. Whether it was error to hold that a defendant failed to meet his burden to prove facts triggering the presumption of prejudice from improper outside influence because he could not get hostile members of the same family to testify against each other or to confess to committing unlawful acts?

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PETITION FOR WRIT OF CERTIORARI

Jim Guy Tucker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals of the Eighth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit, *United States v. Tucker*, is reported at 243 F.3d 499 (8th Cir. 2001)(App. C). The judgment and decision of the District Court for the Eastern District of Arkansas in *United States v. Tucker* appears at 36 F. Supp. 2d 1110 (E. D. Ark., 1999) (App. B).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 27, 2001. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment of the United States Constitution, U.S. Const. amend. V, provides that "No person shall ... be deprived of life, liberty, or property, without Due Process of law."

The Sixth Amendment, U.S. Const. amend VI, provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."

STATEMENT OF FACTS

1. Background – Post-Trial Jury Revelations

On May 28, 1996, former Arkansas Governor Jim Guy Tucker was convicted of conspiracy and mail fraud. Shortly thereafter, Tucker learned that on the fourth day of trial one of the jurors in his case, Renee Johnson, married Charles M. Hayes, who had been denied clemency twice by Tucker on a 40

year sentence for possession of cocaine.

In February 1996, Johnson completed a *voir dire* questionnaire in which she answered "yes" to Question 39, which asked whether "you or any member of your family [had] ever been charged with a crime?" She indicated that this involved a drug conviction of a person currently serving four years. She answered "no" to Question 67, which asked for "any reason whatsoever that you should not serve on this jury...."

Voir dire examination began the week of March 4, 1996. The trial judge and counsel gave potential jurors multiple opportunities to disclose, publicly or privately, any possible sources of bias, including political bias. Johnson did not respond to these overtures. Trial began March 11, 1996. Johnson married Hayes three days later on March 14, 1996. Johnson did not reveal her marriage to the court.

Hayes and his cousins, Tommy McIntosh and Crawford, were convicted in 1987 for possession of cocaine with an intent to distribute. In 1992, all three men petitioned the Governor for executive clemency. Each asserted, *inter alia*, that their "excessive" sentences demonstrated that they were being punished as "political prisoners" because of their association with Robert "Say" McIntosh, Hayes's uncle and Tommy McIntosh's father. Say McIntosh is a political activist in the African American community in Little Rock, Arkansas, known for his virulent attacks on local politicians.

Although Tucker denied Hayes's petition for clemency in July 1992,[1] efforts to obtain clemency for Hayes, Crawford and Tommy McIntosh continued. In January 1993, while Tucker was out of state, State Representative (now Senator) William L. Walker, Jr. asked the acting governor, State Senator Jerry Jewell, to grant clemency to all three men. Soon after,

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[1] The denial was in the form of a letter signed by Tucker and delivered to Hayes in prison.

Jeweli commuted Tommy McIntosh's sentence. After telephone discussions with Tucker concerning these events, his staff refused to turn over the files on Hayes and Crawford to Jewell, thus thwarting their clemency efforts.

The actions of Jewell and Tucker's objections were the subject of substantial local publicity for several months. Say and Tommy McIntosh figured prominently in this publicity. Hayes expressed anger and confusion that his cousin and co-defendant, whose sentence was steeper, would receive clemency, but not him. As Tommy McIntosh later testified it was "a real tough subject in the family."

Hayes was released from prison in April 1993 after the the Eighth Circuit affirmed a grant of *habeas corpus*.

After a well publicized investigation in 1994 to 1995 by Independent Counsel Kenneth Starr, Tucker was indicted on 11 counts in August 1995. Almost immediately, Say McIntosh began a highly inflammatory public campaign against Tucker, by demonstrations in front of the courthouse, loud and disruptive criticism of Tucker at public events, and the erection of a mock cemetery with signs condemning Tucker. In addition, Say McIntosh posted and distributed several fliers accusing Tucker of racism. One flyer, for example, stated "[o]ur governor ... will kill an innocent man for racist reasons and try to make some white jury sympathetic of his 14 indictments." During trial, Tommy McIntosh told Walker that "we have someone on the jury."[2] Say McIntosh sat a few feet from the jury for several days during Tucker's trial.

After learning of Johnson's relationship to Hayes and the McIntosh family, Tucker moved the trial court for a new trial, asserting both juror bias and improper outside influence.

2. The 1996 hearing on Tucker's new trial motion

The district court held a hearing on August 1, 1996, but

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[2] Tommy McIntosh later testified that he was referring to Johnson.

refused to accept evidence on Johnson's bias or on improper influence, dismissing Tucker's allegations as speculative. The hearing was confined to whether extraneous evidence had been placed before the jury.

Although questioning by Tucker's counsel was restricted, Johnson made the following statements under oath: (1) she did not know Hayes when he was in prison; (2) she and Hayes became engaged in 1994, but never set a wedding date; (3) she did not know Say McIntosh, although she was aware of the mock cemetery; (4) she never had any contact with Tommy McIntosh; (5) she "couldn't say" whether Hayes was still in touch with Tommy McIntosh; and (6) she really didn't know what time she got married.

Tucker was barred from inquiring about, *inter alia*, Johnson's answer to Question 39 regarding family members convicted of crimes; whether she considered herself as part of a family with Hayes; whether she knew about Say McIntosh's courthouse demonstrations; and, what she knew of the McIntosh family's animosity towards Tucker.

The district court found that no extraneous evidence had been before the jury. Tucker's counsel, however, proffered what he would have shown for review by the court of appeals.

3. Tucker I - Remand by the Eighth Circuit

In 1998, the Eighth Circuit remanded the case to the district court to conduct a hearing on Tucker's claims of juror bias and improper influence, as required under *McDonough Power Equipment Inc. v. Greenwood*, 464 U.S. 845 (1984). The court noted that "three things about the *voir dire*" must be shown for a grant of a new trial: (1) that Johnson had answered dishonestly; (2) that she was motivated by partiality; and (3) that the facts would have supported striking her for cause. *United States v. Tucker*, 137 F.3d 1016, 1026 (8th Cir. 1998), App. A (*Tucker I*)

With regard to the latter two factors, the Eighth Circuit

held that, if Tucker proved the facts in his proffer, a "sufficient showing" of both partiality and exclusion for cause would be made. *Id.* at 1028-1029, App. 20-22. Thus, the primary issue for remand was Johnson's dishonesty. As to dishonesty, the court focused on two issues: Johnson's understanding of "family", and her failure to answer questions about possible sources of bias. *Id.* at 1027-1028, App.18-20.

With regard to the first, the court rejected the Independent Counsel's claim that only marriage makes a family. Because Johnson "was alleged to have concealed a relationship of great significance to her...", the court stated that Johnson's understanding of the "term 'family'" required further inquiry. *Id.* at 1028, App. 20.

The Eighth Circuit also expressed concern over Johnson's failure to reveal potential sources of bias.

> Johnson's own testimony indicates that she was in a state of complete ignorance about events that nearly caused her husband to spend much of his life in prison. On the other hand, Tucker offered affidavits that indicated that Johnson's husband and extended family were quite preoccupied with those very events.....The information in Tucker's proffer is very difficult to reconcile with Johnson's testimony that she knew nothing about her family's grudge against Tucker.

Id. at 1027, App. 18-19. The Eighth Circuit remanded for further factual findings because "most" of Tucker's proffer was "supported only by his counsel's narrative...." *Id.* at 1029, App. 23.

The Eighth Circuit also remanded Tucker's improper influence claim because it did "have sufficient facts before us to ascertain whether the presumption" of prejudice was triggered. 137 F.3d at 1030, App. 25. The burden to establish

the presumption was placed on Tucker.

The court of appeals framed the issue as involving impropriety in the nature of "intense emotional pressure brought to bear on one juror." *Id.* at 1032, App. 28. In so doing, the court noted that disavowals by the juror would not suffice to establish the absence of improper influence. *Id.*, App. 29. It emphasized that the issue must be determined in light of the "extraordinary saga" of Johnson's relationship to the Hayes/McIntosh family and that family's clemency efforts and its campaign against Tucker. *Id.* at 1031, App. 26.

Although it declined to address whether the burden would switch to the government once the presumption was triggered, the court indicated that the ultimate issue was harmless error. *Id.* at 1030, App. 25. Thus, on the improper influence claim, the court remanded two issues: (1) whether Tucker had sufficient proof to trigger a presumption of prejudice, and (2) if so, was the influence harmless beyond a reasonable doubt.

4. The McDonough Hearing and the District Court

a. The Facts

At the *McDonough* hearing, Tucker submitted evidence supporting his initial proffer. The following additional facts about Johnson's relationship to the Hayes/McIntosh family were also established.

Contrary to her testimony in the 1996 hearing, Tucker showed that Johnson knew Hayes before his release from prison. The couple grew up in the same neighborhood. Johnson had gone with her sister and Hayes's brother[3] to visit

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[3]Johnson's sister was married to Hayes's brother. It was her brother-in-law that she referred to as currently serving four years in response to Question 39. Because Tucker was interested in convictions when he was prosecutor, Attorney General or Lt. Governor or Governor, there was no reason at the time to pursue this answer further. At the hearing, however, Johnson confirmed that she was much closer to Hayes than to her brother-in-

Hayes in prison and, during her 1998 divorce proceedings, she testified that she had "known" Hayes "all my life." She sought to reconcile these conflicts with her 1996 testimony by adopting a personal definition that distinguished between "knowing" someone and "knowing of" someone.[4]

She began dating Hayes shortly after his April 1993 release from prison. They started living together and became engaged in 1994. In November 1995, their daughter was born. They bought a house together and shared living expenses. Johnson testified that she and Hayes lived together "as a family." Hayes's mother agreed that they lived "as a family." Yet Johnson also agreed with a leading question by the Independent Counsel that "only marriage makes a family."

Contrary to her 1996 testimony that she and Hayes had never set a wedding date, about one month before Johnson filled out the *voir dire* questionnaire she scheduled a wedding reception for March 9, 1996 and purchased a wedding ring. Because the couple failed to pay a deposit, the reception was rescheduled for March 28, 1996. Although in 1996 she could not remember the time of her marriage, in 1998 she acknowledged that she and Hayes married during a lunch break on March 14, 1996.

Contrary to her 1996 testimony that she did not know Say McIntosh and never had any contact with Tommy McIntosh, Johnson in fact both knew and had contact with both men and with other members of the McIntosh family. Her best friend dated Tommy McIntosh in high school. Johnson dated

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law.

[4] Despite Johnson's efforts, it remains difficult to understand how someone could not "know" someone until after their release from prison, but still "know" them all her life. During her divorce proceedings, Johnson did not use the same special personal definition of "know" and "know of", which was developed in the 1998 *McDonough* hearing.

her husband's other co-defendant and cousin, Crawford, around that time. In 1993, Johnson dated Tommy McIntosh – soon after he received his controversial clemency from Jewell and while the McIntoshes were picketing Tucker's office. Tommy McIntosh also visited Hayes at the Johnson/Hayes home during the time of Tucker's trial. To reconcile this conflict with her 1996 testimony, she agreed with another leading question by the Independent Counsel that the 1996 question meant contact with Tommy McIntosh on the day the question was asked.

While she was dating Tommy McIntosh, she met his father Say McIntosh. She was not only aware of Say McIntosh's mock cemetery[5], she identified one of the flyers critical of Tucker as representative of the McIntosh flyers. She saw flyers when she visited the restaurant run by Say McIntosh. Although she testified that it "didn't concern" her, she knew of Say McIntosh's activism and read his flyers at times. Johnson explained her 1996 testimony that she did not know Say McIntosh away, again relying on her personal interpretation of "know" and "know of."

Contrary to her 1996 testimony, Johnson admitted that she knew that Hayes and Tommy McIntosh were in contact during the trial; she witnessed these contacts at her and Hayes's home. Hayes and Tommy McIntosh were "like brothers" cousins who would do anything for each other. In the conversations with Hayes during trial, Tommy McIntosh advocated Tucker's conviction, saying "get him convicted." It was from Hayes that Tommy McIntosh learned that Johnson was on the Tucker jury. Hayes spoke with Say McIntosh about the trial and, in fact, helped distribute the McIntosh flyers although he testified he was trying to put his conviction behind

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[5] Multiple witnesses testified that the cemetery signs attacking Tucker were easily visible to passers-by.

him.[6]

At the *McDonough* hearing, Johnson continued to assert that she knew nothing about her husband's or Tommy McIntosh's clemency efforts and their release from prison. She denied having any conversation with anyone in her family about their hatred of Tucker.[7] She generally disavowed bias towards Tucker.

b. The District Court's decision

The district court found that Johnson was neither dishonest nor biased. *United States v. Tucker*, 36 F. Supp. 2d 1110 (E.D. Ark., 1999), App. B.

Based on the decision in *Smith v. Phillips*, 455 U.S. 209 (1982) and the Eighth Circuit's decision in *Goeders v. Hundley*, 59 F.3d 73 (8th Cir. 1995), the district court refused to recognize the doctrine of implied bias, holding that only proof of actual bias could support a new trial. *Id.* at 1116, App. 58-59.

On the actual bias issue, the court based its decision largely on "demeanor", even though such findings did not reconcile the inconsistent testimony of Johnson or Hayes.

As noted, the Eighth Circuit in *Tucker I* identified Johnson's understanding of the term "family" as a material issue – a fact of "great significance" (137 F.3d at 1028, App. 20) – as to her dishonesty. The district court found credible

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[6] Hayes testified that he was "shocked" and "confused" about the denial of his clemency petition because his cousin Tommy McIntosh, with the steeper sentence, received clemency shortly after Jewell took temporary charge. Hayes testified that " it was all politics"; that he got "the bad end of the stick", and that he and Crawford were "political prisoners". Nonetheless, Hayes said he did not put much stock in the clemency effort because the government had appealed the grant of his *habeas* petition.

[7] Both Walker and Hayes testified to a conversation they had about Hayes talking to Johnson about the trial. Hayes stated that Walker expressed his concern that Hayes and Johnson had made a mistake.

Johnson's "testimony" that "only marriage makes a family." 36 F. Supp. 2d at 1115, App. 56. The court did not disclose in its opinion that these words were put in Johnson's mouth by the leading question of the Independent Counsel. The court also did not attempt to reconcile this finding with Johnson's testimony that she lived with Hayes and their child "as a family" and that he was closer to her at the time of *voir dire* than most members of her immediate family. Based on her demeanor as a "private", "literal" person, the court found that she "did not feel that her relationship to Hayes ...was important." *Id.* at 1116, App. 59.

On the related issue of her pending wedding, the district court found that her marriage plans "were not definite." *Id.* at 1115, App. 55. For this, the court chose to credit the testimony of Hayes that during the two years they lived together, he had held out against getting married. There was no attempt to reconcile this statement with Johnson's own (presumably credible) testimony about her wedding plans at the time of *voir dire* and her marriage on the fourth day of trial.

Based on Johnson's credibility, the court found her "distinction" between "knowing" Hayes before his release from prison and only "knowing of him" as "rational, not far-fetched." *Id.* at 1116, App. 59. The court made no mention of her inconsistent testimony during her divorce proceedings, or the fact that this "literal" woman was not using her "interpretation" (*id.*) of the word "know" during those proceedings. Nor did the court note that her 1996 testimony that she did not know Hayes before his release misled both the Independent Counsel and the Eighth Circuit in *Tucker I*. *See Tucker I*, 137 F.3d at 1024, App. 12 ("She did not know her husband while he was in prison"); Brief for Appellee United States of America at p. 53 (8th Cir., filed January 2, 1997)("Johnson met Hayes after his release from prison").

The district court found support for Johnson's ignorance

about her husband and his family in the "credible" testimony of Hayes. 36 F. Supp. 2d at 1116, App. 58. On this score, the Court found Hayes to be "extremely soft spoken, and, in the Court's opinion, genuinely desirous of putting his conviction and his incarceration behind him." *Id.* The court made no attempt to reconcile this "demeanor" finding with Hayes's testimony that he was "upset" and "confused" about the denial of his clemency petition; that he thought it was "political"; that he distributed Say McIntosh's flyers, and that he acknowledged that Walker had expressed concern about his and his wife's activities regarding the Tucker trial. These obviously inconsistent facts were virtually ignored in the court's decision.

Johnson also testified inconsistently in the 1996 and 1998 hearings about her contacts with Tommy and Say McIntosh. The district court resolved these conflicts by simply noting that while in 1998 she "testified that she knew the McIntosh family" (*id.* at 1114, App. 54, her "demeanor" suggested that, like Hayes, they were not "important" to her. *Id.* at 1116, App. 59-60

Even the district court's "demeanor" findings conflict with Johnson's own statements. As noted, Johnson was apparently "literal" only when it was convenient to be so. She stated in her *voir dire* questionnaire that she regularly followed the local news, that she was "occasionally involved" in politics; and that she was "somewhat talkative." These statements were not credited. Instead, the court found that she "admitted" in 1998 that she did not keep up with the news (*id.* at 1114, App. 59); that she "is not politically involved" according to her demeanor (*id.* at 1117, App. 59); and she "is not a talkative person" according to her mother-in-law. *Id.*, App. 61. Although the court found that she was aware of the McIntosh

flyers[8], passed by the mock cemetery several times, and was aware of the family's political activism, it also found that Johnson did not pay attention to her family's views.

The district court also held that Tucker failed to meet his burden to prove improper influence because Tucker could not prove, in the face of their "credible" denials, the actual time or content of any conversations between Hayes and Johnson. *Id.* at 1118, App. 61. Although, as the court of appeals in *Tucker I* held, the issue was one of "emotional pressure" that would likely be denied by a juror, the district court concluded that "... Johnson heeded the Court's regular admonition not to discuss the case with anyone." *Id.* The district court did not identify the standard it applied in making its determination; there is a suggestion in its opinion that its holding related to the evidence necessary to trigger a presumption of prejudice. *Id.* at 1117, App. 60.

The quandary noted by the Eighth Circuit in *Tucker I* was left unresolved by the district court – Johnson's ignorance still could not be squared with the "extraordinary saga" of the Hayes/McIntosh clemency efforts and vendetta against Tucker. *Tucker I,* 137 F.3d at 1027, App. 26. Under the objective evidence; Johnson's own dishonest and evasive testimony, and even her inconsistent self-characterizations, she could only be viewed as a walking contradiction. Yet, the district court purported to resolve the unresolvable through "credibility" findings based on selective presentation of the facts, refusal to reconcile conflicts and ignoring the inconsistent testimony.

5. Tucker II – The Eighth Circuit Decision

In *Tucker II*, the court of appeals affirmed the decision

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[8] Although she testified that she had read some of McIntosh's flyers and identified one critical of Tucker as typical, the district court found that she did not read any flyers. 36 F. Supp. 2d at 1115n. 11, App. 80n.25.

of the district court. *United States v. Tucker*, 243 F. 3d 499 (8th Cir. 2001), App. C (*Tucker II*).

On the issue of implied bias, the court of appeals departed from its precedent in *Goeders*, upon which the district court relied, noting that it had never decided whether implied bias was grounds for a new trial in federal court, as opposed to *habeas* review. Without deciding that issue and only assuming the applicability of implied bias, the Eighth Circuit simply quoted from Justice O'Connor's concurrence in *Smith v. Phillips*, and held that "Johnson is not related to the facts or parties of this case in a manner that approaches ... an extreme situation." *Id.* at 509, App. 79.

The court of appeals, relying on *Anderson v. Bessemer City*, 470 U.S. 564 (1985), gave great deference to the district court's findings on Johnson's dishonesty and bias. It noted that under *Anderson* there are only three ways that such findings could be deemed erroneous.

> First, the accepted testimony could be incoherent or facially implausible.... Second the testimony could be contradicted by extrinsic evidence. Third, the finding itself could be internally inconsistent.

Tucker II, 243 F.3d at 506, App. 74 (citations omitted).

On the crucial issue of Johnson's understanding of the term "family", the court of appeals noted that her agreement that "only marriage makes a family" resulted from a leading question by the Independent Counsel. *Id.* at 503, App. 69. Nonetheless, it bowed to the district court's finding that her answer to a leading question was more credible than her testimony that she lived with Hayes "as a family." "Johnson's *reconciliation of her various statements is not so implausible* that the district court was obliged to find she was dishonest." *Id.* at 507, App. 75. (emphasis supplied). The court of appeals did not review the finding under the other two *Anderson* factors –

contradiction with evidence and internal inconsistency – even though it apparently recognized both the contradiction and the inconsistency.

The court of appeals also accepted the district court's finding that Johnson's wedding plans were not "definite" because the "extrinsic evidence" did not "so contradict Johnson's statements that the district court was obliged to find Johnson had been dishonest." *Id.*, App. 75. The court did not consider however whether it was plausible that Johnson simply forgot in February 1996 that she was planning a wedding for March 1996 and, in fact, married on March 14, the fourth day of trial. It avoided this inquiry by dismissing the wedding as tangential to Johnson's understanding of her relationship with Hayes. "Even assuming Johnson's testimony about the status of her wedding plans *was disingenuous*, the whole question about wedding plans is really subsidiary to the question of whether she was 'virtually married' or part of a 'family' with Hayes at the time of *voir dire* so that she knew her failure to identify him was misleading." *Id.*, App. 75 (emphasis supplied).

The court of appeals also deferred to the findings that Johnson was not dishonest by failing to respond to the *voir dire* requests to disclose anything that could bear on partiality. The court stated that her post-trial use of the word "know" was not "*too* implausible" to support finding her honest. *Id.*, App. 76 (emphasis supplied). Unlike the district court, the court of appeals noted Johnson's testimony in her 1998 divorce hearings that she had "known" Hayes all her life. It did not recognize that she did not use the same definition of "know" in her divorce hearings that she used during the Tucker hearings. Nor did the court recognize that, had the district court acknowledged the 1998 divorce testimony, its finding on Johnson's "interpretation" of "know" would have been internally inconsistent.

The remainder of Johnson's false and evasive answers

were essentially dismissed by the court of appeals as "minor." *Id.* at 508, App. 76-77 . The "extraordinary saga" of Hayes's clemency attempts and the McIntosh vendetta (*Tucker I*, 137 F.3d at 1031, App. 26) and the irreconcilable nature of her 1996 assertions of ignorance in the face of the totality of the circumstances (*id* at 1027, App. 19), were ignored because of her "direct testimony" in 1998 that she knew, heard and saw nothing. While the Eighth Circuit rejected Tucker's argument that under the district court decision he would have had to get Johnson to explicitly admit to dishonesty and bias in order to be granted a new trial (243 F.3d at 509, App. 78), its own decision confirms that this is, in fact, the standard that both courts employed.

For similar reasons, the Eighth Circuit accepted the district court's finding that Tucker had not met his burden to prove outside influence. Applying the clearly erroneous standard, it upheld the district court's view that, faced with Johnson's and Hayes's denials, Tucker had to prove the timing and content of any contact between them. As a result, the court of appeals held that it did not need to make a determination of prejudice. *Id.* at 509-510, App. 81 . Thus, it appears that the court determined that Tucker failed to introduce evidence sufficient to trigger a presumption of prejudice.

REASONS FOR GRANTING THE WRIT

I. The Court Should Resolve The Conflict In The Lower Courts On Implied Juror Bias.

The Sixth and Fifth Amendments to the Constitution guarantee a trial by a fair and impartial jury to every defendant. This case raises important constitutional questions about the existence and scope of implied juror bias in criminal trials; questions that have been resolved inconsistently by lower courts as is demonstrated by the disparate treatment of the doctrine by the lower courts in this very case. The lower courts' confusion

is a direct result of the divided opinions of this Court.

Despite the impact on fundamental rights, the questions surrounding the doctrine of implied bias have remained open since the Court's 1984 decision in *McDonough Power Equipment, Inc. v. Greenwood.* In an opinion by then-Justice Rehnquist on claims of undisclosed juror bias, the Court said:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that the juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause.

464 U.S. at 556. Five members of the Court wrote separately to confirm their understanding that Justice Rehnquist's opinion did not foreclose a new trial where "in exceptional circumstances... the facts are such that bias is to be inferred." *Id.* at 556-557(Blackmun, J., Stevens, J., and O'Connor, J. concurring); *id.* at 557(Brennan, J. and Marshall, J. concurring in judgment).

McDonough followed closely after the Court's 5 to 4 decision in *Smith v. Phillips*, 455 U.S. 209 (1982). In *Smith*, which involved the adequacy of a hearing on juror bias in a state court, four members of the Court wrote separately concerning their view that "the opinion does not foreclose the use of 'implied bias' in appropriate circumstances." *Id.* at 221 (O'Connor, J., concurring); *id.* at 224 (Marshall, J., Brennan, J., and Stevens, J., dissenting).

Predictably, these close decisions have engendered considerable confusion and conflict in the lower courts.[9]

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[9] Most courts recognize that a challenge for cause can be based on either actual or presumed bias. *E.g., United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000)(most for cause exclusions based on implied not actual bias); *United States v. Torres,* 128 F.3d 38 (2d Cir. 1997)(juror

Conflicting decisions exist on the larger question of the continued validity of the doctrine. *Compare Goeders v. Hundley*, 59 F.3d 73 (8th Cir. 1995) *with Tinsley* v. *Borg*, 895 F.2d 520 (9th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991).

Conflicts exist on the standards to be employed in determining implied bias. *See United States v. Masiarczyk*, 2001 U.S. App. LEXIS 553 at *28-29 (4th Cir., January 12, 2001)(dishonesty not a factor in implied bias); *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991)(dishonesty established implied bias); *Hunley* v. *Godinez*, 975 F. 2d 316, 320 (7th Cir. 1992)(dishonesty only one factor in determining bias); *Skaggs v. Otis Elevator Co.*, 164 F.3d 511 (10th Cir. 1998), *cert. denied*, 528 U.S. 811 (1999)(*McDonough* is a third test, separate from actual or implied bias); *United States v. Perkins*, 748 F.2d 1519, 1532 (11th Cir. 1984)(actual bias includes showing of a close connection to the circumstances that bias is presumed).

Conflicts also exist as to the scope of the "exceptional circumstances" test for implied bias; a test often employed as a result of Justice O'Connor's concurrence in *Smith*[10] and the five

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excused for cause based on finding of actual, implied or inferable bias); Indeed during *voir dire*, the district court excluded one juror for cause because her husband had been appointed to a state commission – an obvious application of implied bias. In *Tucker I*, the court of appeals indicated that family animosity towards a party, or other family political involvement, would support a challenge for cause. 137 F.3d at 1029. Some of the confusion in the lower court decisions since *McDonough* may stem from imposing a subjective "dishonesty" requirement on an inquiry – presumed bias – that is based upon objective factors.

[10] In her concurrence, Justice O'Connor set out "[s]ome examples" that "might" support a finding of implied bias. These included "a revelation that the juror is an actual employee of the prosecuting agency, the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." Justice O'Connor, however, was careful to note that

member concurrences in *McDonough*. *Compare United States v. Tucker*, 243 F.3d at 509, App. 79 (exceptional circumstances restricted to juror "related to facts or parties" of the case before the court) *with Dyer v. Calderon*, 151 F.3d 970, 982 (9th Cir. 1998), *cert. denied*, 525 U.S. 1033 (1998) (implying bias of juror not involved in and with no relationship to trial participants").

Inconsistencies are also found in the decisions of state courts. *See generally* Loewy, *When Jurors Lie: Differing Standards for New Trials*, 22 Am. J. Crim. L. 732 (Spring 1995).

The confusion surrounding the doctrine of implied bias is apparent from the lower courts' decisions in *Tucker II*. The objective facts[11] established that Johnson lived with; had a child by; purchased a house with, and shared finances with a man, Hayes, whose petition for clemency was not simply denied, but thwarted, by Tucker under circumstances that generated considerable local controversy. Johnson not only had a very close relationship with Hayes, but also with other members of his family; a family that both before and during trial carried on

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"each case must turn on its own facts." *McDonough*, 455 U.S. at 222.

[11]It has been held that implied bias raises an issue of law and that it is a mixed issue of law and fact. *Compare Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991) *with United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000). Both, of course, would require some level of *de novo* review. *See e.g., United States v. Cerrato-Reyes*, 176 F.3d 1253, 1260 (10th Cir. 1999)("whether the average person in the position of the juror would be prejudiced"); *United States v. Plache*, 913 F.2d 1375, 1377 (9th Cir. 1990)("whether the case presents a relationship in which the 'potential for substantial emotional involvement, adversely affecting impartiality is apparent'"). These views are in accord with the rationale underlying the doctrine, which, as noted by Justice O'Connor in *Smith*, stems from the recognition that a juror "may have an interest in concealing" or "be unaware" of his or her bias. *Smith*, 455 U.S. at 221-222.

a very public vendetta against Tucker.

No one has argued that Johnson would have been qualified to sit as a juror if the facts of her ties to Tucker adversaries had been disclosed during *voir dire* or during trial. *Cf. Rushen v. Spain*, 464 U.S. 114 (1983)(acknowledging mid-trial juror challenges). As the Eighth Circuit held in *Tucker I* disclosure would have supported excluding her for cause. 137 F.3d at 1029, App. 21. Yet, the trial court did not consider these objective facts to determine if bias should be implied because it held that the doctrine had been rejected by this Court and the Eighth Circuit.

Rather than affirming the district court's application of its own precedent, the Eighth Circuit finessed by assuming, without deciding, that the "exceptional circumstances" test might apply to what it viewed as an "unusual" case. *Tucker II*, 243 F.3d at 501, App. 64. Without reviewing the facts relevant to that test, the court held that an "extreme situation" did not exist because Johnson was "*not related to the facts or parties of this case.*"*Id.* at 509, App. 79.(emphasis supplied).

The Independent Counsel, asserting that Justice Rehnquist's opinion in *McDonough* controlled, focused its arguments on Johnson's subjective statements of honesty, which the trial court accepted as credible.[12]

Tucker argued that he had met his burden of showing dishonesty and bias, whether actual or implied. He also argued that dishonesty was not a prerequisite to a finding of implied bias. Moreover, he contends that the Eighth Circuit erred by

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[12] Although its discussion of implied bias is cursory at best, it would appear that the Eighth Circuit would not require that a defendant prove juror dishonesty to establish implied bias. The concurrences in both *McDonough* and *Smith* were based, in part, on the risk of concealment of bias by a juror, which would not be revealed through a hearing. *E.g. Smith*, 455 U.S. at 221-222. This differs from the position taken by the Office of Independent Counsel before the lower courts in *Tucker II*.

interpreting the "exceptional circumstances" test as requiring a showing that Johnson was directly related to the facts or parties in his trial, and by failing to recognize, as it had in *Tucker I*, that the proffered facts once established would have supported excluding Johnson for cause.

In summary, the opinions and arguments in *Tucker II* encapsulate all of the inconsistencies and conflicts that have been the consequences of the divided guidance of this Court in *McDonough* and *Smith*. Such confusion should not be permitted to continue under circumstances that implicate a defendant's Due Process and Sixth Amendment rights.

II. The Decisions Below Conflict With The Decisions Of This Court

The Eighth Circuit committed three fundamental errors of constitutional significance in its review of the district court's findings on dishonesty and bias[13], and improper influence. [14] First, in *Tucker I*, the court effectively imposed a standard of proof on Tucker higher than any standard ever imposed on a criminal defendant for an issue with constitutional implications. Second, the court of appeals erred by failing to review *de novo* the district court's application of the appropriate standard to evaluate its factual findings. Third, the court of appeals erred by abjectly deferring to questionable credibility findings, which insulated the district court's decision from any meaningful review.

A. The decision below conflicts with this Court's

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[13] Dishonesty was the focus of both the lower court opinions. The Eighth Circuit held that findings as to dishonesty dictated a bias finding. *Tucker II*, 243 F.3d at 508, App. 77-78.

[14] With regard to the improper influence claim, *see also Part III, infra.* at pp. 28-30. Tucker is making alternative arguments with regard to this claim because of the lower courts' failure to clarify the standard of proof being imposed on him.

decisions on the standards of review for constitutional cases.

Appellate review includes determining whether "factfinding was ... affected by erroneous legal principles." *Strickland v. Washington*, 466 U.S. 668, 698 (1984). In this case, the Eighth Circuit reviewed the district court's decision solely through application of the clearly erroneous standard for appellate review of findings of fact. The court did not review or even identify the prism through which the factual findings were to be judged. This failure resulted in requiring Tucker to prove partiality and improper influence beyond a reasonable doubt, even though the court of appeals had indicated in *Tucker I* that a lesser standard would apply. As this Court has made clear, the clearly erroneous standard represents only one side of the appellate review equation. Thus, this case raises the constitutional question of the appropriate standard of review in juror impartiality cases.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-254 (1986), the Court recognized that the applicable standard for evaluating facts should reflect the nature of a case's impact on fundamental rights. Thus, in comparing different standards, the Court distinguished between that applicable in a "run-of-the-mill civil case" to the "clear and convincing" evidence standard required in libel cases because of the First Amendment. The Court also held that the same standard should apply to the different decision points in any case, *e.g.*, summary judgment, directed verdict. *Id.* at 255.

It is obvious from *Anderson* that the standards employed are aimed at giving protection to those who hold the right. Thus, in that case, the plaintiff had to submit clear and convincing proof to overcome the defendant right holder's motion for summary judgment. Conversely, if the burden is on the one holding the right, the burden of proof will be reduced. *See e.g., Strickland v. Washington, supra.*

Voir dire examination is aimed at "*exposing possible*

biases, both known and unknown, on the part of potential jurors." *McDonough*, 464 U.S. at 554 (emphasis supplied). *Anderson* suggests that the reasonable possibility standard should be the prism through which the facts of juror impartiality are evaluated by courts in *McDonough* hearings. The "reasonable possibility" standard is essentially the flip side of "requiring the beneficiary [the prosecution] of a constitutional error to prove beyond a reasonable doubt" that the error was harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967). Reasonable possibility is thus consistent with the standard used by the state court in *Smith*. The Court there emphasized, in upholding the adequacy of the post-trial hearing, that the state court had found the particular juror impartial "beyond a reasonable doubt." 455 U.S. at 211. Identical standards were applied by the Court in reviewing a claim of improper influence in *Remmer v. United States*, 350 U.S. 377 (1956)(*"Remmer II"*) and *Remmer v. United States*, 347 U.S. 227 (1954)(*"Remmer I"*). *See also Burton v. Johnson*, 948 F.2d at 1158 ("Doubts about a juror must be resolved against the juror").

The Court has applied different standards in other constitutional cases. Thus, in *Strickland* the Court rejected placing a burden on a defendant to show prejudice due to ineffective assistance of counsel by a preponderance of the evidence. Such a claim, the Court stated, involves "the absence of one of the crucial assurances that the result of the proceeding is reliable,... [thus] finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." 466 U.S. at 694. For these cases, a "reasonable probability" standard was adopted. *Id.*

When a fundamental constitutional right is involved, such as the right to an impartial jury, the Court has never imposed on the holder of the right – here a criminal defendant – the burden of reasonable doubt. In fact, in all of the cases discussed, the burden on the holder of the constitutional right

has been lower than a preponderance of the evidence.

In this case, the Eighth Circuit initially placed the burden on Tucker to produce "sufficient showing." *Tucker I*, 137 F.3d at 1028, App. 21 . While hardly a model of clarity, *Tucker I* still indicates that the standard of proof required of Tucker on remand was a lower standard consistent with this Court's precedents. The district court morphed "sufficiency" into a burden on Tucker to prove partiality and influence beyond a reasonable doubt. For example, no matter how sufficient Tucker's proof of Johnson's dishonesty, the only evidence that would have sufficed for the district court would have been an admission by her that she lied during *voir dire* and the 1996 hearing about her ties to the Hayes/McIntosh family.

By rubber-stamping the district court's credibility findings, the court of appeals, *sub silentio* and after the fact, approved the imposition on Tucker – the holder of the constitutional right – of proof of dishonesty, bias and improper influence beyond a reasonable doubt. Application of such a high standard of proof was legal error.

B. The Eighth Circuit erred by failing to review de novo whether the district court applied the appropriate standard.

The Eighth Circuit further erred by not reviewing the district court's application of any standard *de novo*. The court of appeals' action directly conflicts with this Court's decision in *Ornelas v. United States*, 517 U.S. 690 (1996).

In *Ornelas,* the appellate court deferred to a lower court's credibility findings to establish reasonable suspicion and probable cause for a search. In an 8 to 1 decision, the Court remanded the case to the court of appeals for a *de novo* determination of whether the facts found satisfied the standards.

The Court distinguished between review of historical facts, and review focused on "whether the rule of law as applied

to the established facts is or is not violated." *Id.* at 696-697 *quoting Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982). This was required because the issue implicated Fourth Amendment rights:

> A policy of sweeping deference would permit, "in the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient to constitute probable cause."

Id. at 697 *quoting Brinegar v. United States*, 338 U.S. 160, 171 (1949). Because both reasonable suspicion and probable cause "are ... fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed"(*Ornelas*, 517 U.S. at 696), *de novo* review was "necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.* at 697.

The pertinence of *Ornelas* to this case is readily apparent. If, for example, a reasonable possibility of dishonesty and bias, either actual or implied, represents the constitutional standard for determining whether a defendant's Sixth Amendment and Due Process rights were violated, it cannot be determined solely by "sweeping deference" to credibility findings that insulate a decision from review.

The varied conclusions of lower courts on jury impartiality and influence demonstrate that the law is not evolving as the Court in *Ornelas* envisioned.[15] It is also obvious from these cases that the standards are fluid concepts that "acquire content only through application." *Id.* at 697.

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[15] For examples of different outcomes from the same or similar facts, *see* Annotation, *Fact That Juror In Criminal Case, Or Juror's Relative Or Friend, Has Previously Been Victim Of Criminal Incidents As Ground Of Disqualification*, 65 A.L.R. 4th 743 (2000).

While "each case must turn on its own facts,"[16] without any "law declaration aspect of independent review," there will be no potential for unifying precedent or stabilizing the law. *Thompson v. Keohane*, 516 U.S. 99, 115 (1995); *see also Remmer II*, 350 U.S. at 381-382 (*de novo* review of facts on improper influence). The insurmountable burden placed on Tucker, as a result of the Eighth Circuit's failure to independently measure the facts against any standard, highlights the need for a decision by this Court.

C. The Eighth Circuit erred by abjectly deferring to the district court's factual findings.

Even the review of the district court's decision that was made by the Eighth Circuit was inconsistent with this Court's interpretation of the clearly erroneous standard, and with the Court's decisions in other jury bias cases. These errors resulted from the Eighth Circuit's refusal to evaluate the credibility findings under all of the factors delineated by the Court in *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985); its deference to testimony prompted by leading questions that the Court has repeatedly deemed unreliable, and its refusal to undertake a review of the issues under a totality of the circumstances test.

In *Tucker I*, the Eighth Circuit stated that Johnson's disavowals of dishonesty, bias or influence had to be judged within the entire context of the "extraordinary saga" of her husbands's clemency attempts and the Hayes/McIntosh family's animosity towards Tucker. In *Tucker II* this guidance was ignored by both the district court and the court of appeals. Instead, Johnson's ignorance of her family's very public opinions and activities was found credible, as were her answers to leading questions by the Independent Counsel and her after-the-fact attempts to rehabilitate false and misleading statements

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[16] *McDonough*, 455 U.S. at 222 (O'Connor, J. concurring).

through linguistic gymnastics. What was considered significant in *Tucker I* as to her relationship with Hayes at the time of *voir dire* – for example, Johnson's wedding plans – became tangential in *Tucker II*. Only by separating each fact from its context could the credibility of one version of Johnson's "various statements" (*Tucker II*, 243 F.3d at 507, App. 75) on the "significant" questions (*Tucker I*, 137 F.3d at 1028, App. 20) about her understanding of the *voir dire* questions be accepted.

Anderson v. Bessemer City does not support such abject deference to trial court credibility determinations. Giving deference to such findings "is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations." 470 U.S. at 575.

> Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it.

Id. In making this distinction, the Court cited *United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1948), in which findings of a trial court based on the credibility of testimony in response to leading questions were rejected as inconsistent with objectively established facts. *Id.* at 395-396. This should hold particularly true in a juror impartiality case: "a juror's assurances that he is equal to the task cannot be dispositive of the accused's rights." *Murphy v. Florida*, 421 U.S. 794, 800 (1975). *See also Remmer II*, 350 U.S. at 378-379 (rejecting credibility findings for determination of improper influence).

In *Murphy*, the Court not only rejected the reliability of answers to leading questions, it also emphasized that even "credible" juror statements must be reviewed in light of the total circumstances. The Court held that a juror's answers to a leading presupposing a worst case scenario for the defendant

did not establish actual bias in the face of conflicting testimony by the same juror. *Id.* at 801-802.[17] Even juror disavowals "might be disregarded", the Court said, where the environment was "sufficiently inflammatory" to draw into question a juror's assurances of indifference. *Id.* at 802-803. While *Murphy* involved prejudicial publicity, the Court's holding is equally applicable to the prejudices resulting from "inflammatory" opinions about a defendant held by a smaller "family" community. *See also Remmer II*, 350 U.S. at 381 (focus is on whether the "total picture reveals such a state of facts that neither [the juror] ... nor anyone else could say that he was not affected in his freedom of actions as a juror").

The Eighth Circuit rubber-stamped the trial court's findings without making the considered, albeit deferential, review mandated by this Court in *Anderson v. Bessemer City*. It not only failed to apply all of the *Anderson* factors to the district court's findings, it accepted as reliable what this Court has repeatedly deemed unreliable –answers to leading questions – and did so with regard to material facts. This error was compounded by its refusal to evaluate Johnson's answers in light of the circumstances of her relationship to Hayes and the inflammatory campaign against Tucker that her husband's family, with his assistance, waged before and after the trial.

In short, under the Eighth Circuit decision, the "remedy" of an evidentiary hearing afforded by the Court in *McDonough* is a meaningless one. Constitutional rights will be casually overridden by ceding to findings of trial judges, who will often – as in this case – find and evaluate facts on remand that they

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[17] Of course, in *Murphy* the answer to the leading question was asserted as a grounds for finding bias, whereas in *Tucker II* the answers to leading questions were accepted as demonstrating Johnson's honesty and impartiality. The principle remains the same, however. Answers to leading questions are unreliable.

had previously deemed unworthy of their time.

III. This Case Raises Constitutional Issues Regarding The Burden To Trigger The Presumption Of Prejudice Due To Improper Influence.

As noted in the Statement (*supra* p. 15) the Eighth Circuit in *Tucker I* remanded the case to provide Tucker the opportunity to establish facts to trigger the presumption of prejudice due to improper influence. There are at least some indications in both lower court opinions in *Tucker II* that the courts' were ruling only on this issue. 36 F. Supp. 2d at 1117, App. 60; 243 F.3d at 503, App. 68. If so, this case raises the issue of whether, as a matter of law, a defendant must prove that a direct contact with a juror occurred, and the content of such, before the presumption of prejudice from improper influence is triggered.

In *Remmer I*, the Court established the process for courts to follow in making decisions on claims of improper influence on a juror. As *Remmer I* indicates, the first step is to determine whether there is sufficient evidence to trigger a presumption of prejudice. Once the presumption attaches, the defendant is entitled to a hearing in which the burden is on the prosecution to show harmless error. The defendant, in other words, is entitled to a new trial unless the district court finds, beyond a reasonable doubt, that no prejudicial influence occurred.[18] This process was developed as a means of protecting a criminal defendant's constitutional right to a trial before an impartial jury.

In *Remmer I* the Court made a *de novo* determination

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[18] Some courts interpret *Smith* as disapproving of this part of *Remmer I*, holding that the the ultimate burden to show improper influence is alson on the defendant. *E.g., United States v. Corrado*, 227 F.3d 528, 536 (6th Cir. 2000). As discussed in Part II, this would not transform a defendant's burden to a showing of influence beyond a reasonable doubt.

whether the facts known at that time triggered the presumption. It is apparent from the Court's review that the factual showing necessary to trigger the presumption of prejudice is not great. "[A]ny private communication, contact, or tampering, *directly or indirectly*, with a juror during a trial about the matter pending before the jury is...presumptively prejudicial...." *Id.* at 229 (emphasis supplied). Later cases have interpreted *Remmer I* as requiring a hearing if there is a showing of a "reasonable possibility" of prejudice. *E.g., Tucker I*, 137 F.3d at 1030, App. 25.

At the *McDonough* hearing, Tucker showed, *inter alia*, that Tommy McIntosh and Hayes were "like brothers" who would do anything for one another; that McIntosh hated Tucker and told Hayes to "get him convicted"; that McIntosh assumed Hayes and Johnson talked during the trial; that during the trial Tommy McIntosh boasted that the family had "someone on the jury"; that Hayes discussed the trial with Say McIntosh, who sat within feet of Johnson during the trial[19]; and that, after the trial, Hayes admitted to Walker that he talked to his wife about the trial, which prompted Walker to express concern that Hayes and his wife made a mistake. There should have been little doubt that Tucker demonstrated a reasonable possibility that Johnson was subject to outside influence. Johnson was not simply related to, but at the time of *voir dire* actively trying to join a family who did not hesitate to air their intense hatred of Tucker at the courthouse, in the community and at her own home. *Cf. Turner v. Louisiana*, 379 U.S. 466 (1965)(jurors in custody of deputy prosecution witnesses presumed partial); *Rideau v. Louisiana*, 373 U.S. 723 (1963)(confession broadcast); *Irvin v. Dowd*, 366 U.S. 717(1961)(inflammatory publicity).

Tucker, however, was unable to wrench an admission

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[19] *E.g., United States v. Gaston-Brito*, 64 F.3d 11 (1st Cir. 1995)(hand signal by agent implicating defendant; prejudice presumed).

from Johnson, Hayes or Tommy McIntosh that direct attempts to improperly influence her had been made – in other words to admit that they had been involved in unlawful activities.[20]

By affirming through deferring, instead of reviewing *de novo* as *Remmer I* requires, the Eighth Circuit placed an insurmountable and unrealistic burden on Tucker simply to establish a presumption – a presumption that not only provides a defendant a hearing but also requires courts to review the total circumstances and resolve doubts in favor of the defendant. It thus eviscerated the "remedy" of a hearing and the constitutional rights a hearing was designed to protect.

CONCLUSION

For the reasons set forth, the petition for certiorari should be granted.

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[20] *E.g.*, 18 U.S.C. Sec. 1503 (crime to attempt to influence a juror). At the time of both the 1996 and the *McDonough* hearings, it was a matter of public record and press reports that Tucker claimed that the Hayes/McIntosh family improperly influenced Johnson. It is noteworthy that both Hayes and Tommy McIntosh met with the Independent Counsel on December 2, 1998, the day before the hearing started. This was near the time that Hayes was trying to reconcile with Johnson. The couple lunched with Say McIntosh on the first two days of the hearing. Hayes of course denied that any discussions about the hearing took place.

APPENDIX

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Appendix A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-3231

United States of America,

Appellee,

v. * Appeal from the United States
* District Court for the
Jim Guy Tucker, * Eastern District of Arkansas.

Appellant.

Submitted: April 17, 1997
Filed: February 23, 1998

Before McMILLIAN, JOHN R. GIBSON, and BEAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Jim Guy Tucker, the Governor of Arkansas until his conviction in this case, appeals from his conviction for conspiracy and mail fraud. Tucker was indicted in a twenty-one count indictment, together with James and Susan McDougal, the former controlling persons of Madison Guaranty Savings and Loan, a thrift institution that failed. The first count of the indictment charged an overarching conspiracy to misuse the funds of Madison and of Capital Management Services, a small business investment company headed by alleged co-conspirator and key government witness David Hale. Tucker was indicted on the conspiracy charge and ten substantive counts based on

individual transactions. At the close of the government's case, the district court dismissed Counts 8-11.[1] The remainder of the case was submitted to the jury, which acquitted Tucker of Counts 2-4 and 20-21[2] and convicted him of Count 1, conspiracy, 18 U.S.C § 371 (1994), and Count 12, mail fraud in connection with a loan from Capital Management Services to Castle Sewer and Water Corp. 18 U.S.C. § 1341 (1994).

On appeal, Tucker contends the convictions should be reversed because after trial it was discovered that a juror was married to a former state prisoner to whom Tucker, as governor, had denied clemency. Tucker also attempted to establish that the juror and her husband had engaged in discussions about the case during the trial. Tucker further objected to the empaneling of a juror who gave answers to a written jury questionnaire that were inconsistent with a defendant's right to remain silent and the presumption of innocence. Tucker contends that there was insufficient evidence to convict him of mail fraud and conspiracy. He also raises several points of evidentiary and instructional error. We conclude that Tucker has not demonstrated error on any ground except for the limitations the district court imposed on the hearing concerning alleged misconduct of one juror. We remand for a fuller hearing on the issues pertaining to the one juror.

The government's case involved the several mutually dependent business transactions of Jim Guy Tucker, Susan and James McDougal, and David Hale, as described in the

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[1] Counts 8-11 alleged substantive offenses in connection with a loan by Capital Management Services to The Communication Company.

[2] Counts 2-4 alleged various types of fraud in connection with a loan to Dean Paul. Counts 20 and 21 alleged misapplication of Capital Management's money and causing false statements to be entered in the books and records of Capital Management in connection with a loan by Capital Management to Southloop Construction

testimony of David Hale. Hale was a municipal judge in Little Rock, where the McDougals operated Madison Guaranty and where Tucker practiced law. All were active in state politics in one capacity or another and all had multifarious business interests.

Hale described a meeting between Tucker, James McDougal, and himself in the fall of 1985. The three went out to a new development called Castle Grande, which McDougal had developed, to view thirty-four acres of property McDougal had just sold Tucker. In fact, McDougal had made Tucker buy the property as a prerequisite to Madison loaning Tucker money he needed to pay off another debt. After viewing the thirty-four acres, the three went to Tucker's house and sat around the kitchen table, visiting. James McDougal asked Hale about the lending limit of Capital Management Services, Hale's small business investment company. Hale told McDougal that the lending limit was $150,000.

The lending limit was a function of the amount of capital Hale had available to invest in Capital Management Services. The owner of a small business investment company would invest a certain amount, and the Small Business Administration would then provide three times the amount of that capital for the company to lend to small businesses. The company could only lend a particular borrower an amount equal to thirty percent of the company's capital. Since Hale had $500,000 capital in the company at that point, his lending limit to a particular borrower was therefore $150,000.

After asking Hale about his lending limit, James McDougal then turned to Tucker and said, "We're going to have to get some more money into David's SBIC [small business investment company]." McDougal said, "I'm going to need some funds, and Jim Guy is going to need some funds, and we're going to have to clean up--clean up some members of the political family .. . ." The three decided that Hale should sell some property to generate the capital needed to increase Capital Management's lending limit to $300,000, so it could make loans for the benefit of Tucker and McDougal. They settled on a piece of property used for a restaurant known as

Etta's Place. The three discussed whether the Etta's Place property would appraise out at a high enough value to generate a profit of $500,000, but McDougal said to let him worry about that. They agreed Hale should sell this property to a straw man to generate a profit of $500,000. Madison would loan the purchase money to the straw man. Hale would then invest the money in Capital Management Services. For every dollar Hale invested in Capital Management, the Small Business Administration would make available three dollars for Capital Management to loan to other businesses. In this way, the friends could leverage a dollar lent by Madison to the straw man into four dollars of available money.

In order to get an appraisal to support the Etta's Place deal, Hale's colleague, William Watt, hired Robert Palmer to appraise the property. Upon first looking at the property, Palmer reported to Watt that it would only be worth $300-400,000. Watt told him that the appraisal was for David Hale, who was "doing a favor" for James McDougal, and that Hale needed an appraisal of $750,000. Watt told Palmer to "do whatever you have to do." Palmer issued an appraisal valuing the property at $755,000, though he testified that he knew it was not an accurate appraisal. Hale found a buyer, Dean Paul, to serve as straw man in the Etta's Place transaction.

During the time that the Etta's Place transaction was being worked out, Tucker told Hale that Madison owned the sewer and water system at Castle Grande, and that Madison needed to divest itself of this property before an upcoming federal regulatory examination, because Madison was not supposed to own a utility. Tucker was to set up a corporation to buy the sewer and water system. To finance the sale, the corporation would borrow the down payment from Capital Management and the rest of the purchase price from Madison.

Tucker incorporated Castle Sewer and Water Corp., naming two of his employees, Dwight Harlan and Lorita King, as president and secretary. Tucker owned two-thirds of the stock and the other third was owned by R. D. Randolph, a McDougal associate. Tucker then submitted a loan application to Capital Management asking for a loan of $150,000, or

$300,000 if possible. In the loan application, Tucker stated that the loan proceeds would be used "for initial operating capital and maintenance and painting of the [water] storage tank." Hale stated that at the time he received the application, he knew that this statement in the application was false, because the real purpose of the loan would be to make the down payment on the water and sewer facilities. With the loan application, Tucker submitted a proposed, or pro forma, balance sheet showing what Castle Sewer and Water's financial condition would be if it received the proposed $300,000 loan. The pro forma balance sheet showed as assets both the water and sewer facility, valued at $1.5 million, and the $300,000 in proceeds from the loan. In fact, in order to obtain the sewer and water facility, the corporation would have to use the $300,000 as a down payment, and so would never have both the facility and the $300,000 cash at the same time. Therefore, Tucker's pro forma balance sheet overstated the corporation's assets by $300,000 and hid the fact that the loan from Capital Management was to be used as a down payment on the facility.

Capital Management made the loan to Castle Sewer and Water in the amount of $150,000. The loan closed the same day as the straw man's purchase of Etta's Place. Tucker received the check, personally endorsed it and deposited it in a Castle Sewer and Water bank account.

Tucker did not undertake any personal obligation in connection with the purchase. The co-owner of Castle Sewer and Water Corp., R. D. Randolph, signed a personal guaranty of the corporate debt to Madison, although he testified at trial that he did not realize he had done so at the time. Tucker later gave his stock to Randolph, who actually ran the utility for some time. Randolph made some interest payments on the loan from Capital Management, but eventually the corporation defaulted on the debt. Randolph discharged the guaranty through personal bankruptcy.

After the Castle Sewer loan was made, Hale filled out and mailed to the Small Business Administration a Form 1031, which was required by the administration for every loan. The Form 1031 required a statement of the purpose of the loan.

Hale filled in the purpose: "working capital."

Hale testified that Tucker was angry when he discovered that Susan McDougal had drawn a real estate commission on Madison's sale of the sewer and water facility to Castle Sewer and Water Corp. and that James McDougal had received a sizable bonus because of the sale. Hale testified that Tucker complained to him that the McDougals' "commissions could get us all put in jail." Later, Hale said Tucker called him from the governor's mansion, upset by newspaper articles about the Castle Sewer and Water loan. Hale said that Tucker said the article had some facts that no member of the Arkansas press had the "IQ high enough to dig . . . out." Tucker told Hale not to talk to the press about the transaction, and he, Tucker, would "shut the locals down."

Although there was a great quantity of evidence of other transactions, in light of the district court's dismissal of Counts 8-11 and the jury's acquittal of Tucker on Counts 2-4 and 20-21, it is unnecessary to recite it.

I.

Tucker's most substantial argument is that the district court erred in denying Tucker's motion for a new trial on the grounds of alleged misconduct of Juror Renee Johnson Hayes in failing to respond to questions on voir dire and in engaging in private communications about the case during trial.

A.
(1.)

Johnson's juror questionnaire contained answers that she was single, that questions concerning a spouse were not applicable, and that she had one three-month- old child. In response to a question asking whether "any member of your family had ever been charged with a crime," she stated that a member of her family had a drug conviction and was serving four years. She stated that she had not formed an opinion regarding the guilt or innocence of any of the defendants.

During the district court's comments to the jury following the reading of the indictment in the voir dire examination, the judge repeatedly emphasized the need for the venire members to reveal possible sources of bias during voir dire and gave them multiple opportunities to disclose anything that could have any bearing on their partiality.[3]

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[3] For instance, the Judge said to the jury:

> Let me give you [an] example. Suppose we have a juror who has read certain articles about this case and, . . . you talked with a friend who knows everything that goes on in the State of Arkansas, and you take the position I will do my best to base my verdict on that evidence that is presented during the next six or eight weeks, but I don't know, that friend of mine, he's pretty close to me. I might give his views some weight. Now, if that's disclosed, the lawyers would ask the Court to excuse that juror for cause.

During the questioning of the individual venire members concerning whether they had been a victim of crime or involved in law enforcement, or had relatives or close friends who were involved in law enforcement, the district judge asked:

> Is there anything that you think, I don't care how insignificant you might regard it, anything that you think you should disclose that might have some bearing on whether you can be fair and impartial to both the United States Government and each defendant. Now, its going to take us approximately six to eight weeks to try this lawsuit. Anything that you would like to disclose that might have some bearing.

After several responses the court stated further:

> Is there anything you would like to disclose at this point that might have some bearing on whether or not you can be fair and impartial to

The judge assured the venire members that they could bring up matters privately:

> But let me admonish you that in the event there is a question that you feel that you would like to respond in private, you make that request, I'll consider it, and we will retire to chambers.

The prosecutor then addressed a group of four jurors including Ms. Johnson, in a small group:

> I want to cast this question in the broadest terms as possible, and I have touched on this specifically with regard to the areas we've covered before now, but is there anything that comes to mind of any of you, Mr. Swope, is there anything you can tell us that would affect your ability to serve fairly and impartially in this case? It may not be something I've asked you about directly but it may be something that is in the back of your mind, hasn't come up before now, hasn't occurred to you before now, before your opportunity to tell about it now, and maybe it's something you don't want to talk about publicly. If that's the case, we can make arrangements to tell the Court outside the public forum. This is true for each of you. Is there anything that you can bring to our attention that would affect your ability to serve fairly and impartially in this case. Mr. Swope?

> both sides, and is there anything that you think that you should disclose that might have some bearing on whether you can be fair and impartial to both sides?

The court further stated that:

> We also want to avoid not only impropriety in fact, but even the appearance of it.

A. No, sir.
Q. Ms. Johnson?

A. No.

Counsel for Tucker asked that same group of four jurors:

Q. As you sit here this afternoon is there anything at all, and I'm saying you are the only one that knows this, is there anything at all negative that you harbor about him? . . .
Q. Ms. Johnson?
A. I have no opinion.
Q. As I asked the others, I will ask you, just examine yourself. What do you think? How do you feel? How do you feel about Governor Tucker?
A. I have no opinion. I don't know.
Q. You have no feelings at all?
A. Yes, I have feelings.
Q. Tell me what those are.
A. About Governor Tucker? I guess he's been a good governor.

No one asked Ms. Johnson any question particularly directed to the statement in her questionnaire that a member of her family had previously been convicted of drug charges.

(2.)

After trial, Tucker filed a new trial motion alleging that he learned after trial that Juror Renee Johnson married Charles Marvin Hayes during the trial.[4] Tucker's motion alleged that he had reason to believe that Hayes was the father of Juror Johnson's child.

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[4] A copy of the marriage license was attached to Tucker's motion as Exhibit 7; the license was issued March 14, 1996, and the marriage was performed on that date. (The voir dire in this case began on March 4, 1996 and the first day of trial was March 11, 1996.)

Tucker's motion contained detailed factual allegations. It stated that there was reason to believe that Hayes's mother was Emma Ruth McIntosh Hayes,[5] which would make Charles Hayes the nephew of Robert "Say" McIntosh. Hayes had been convicted of possession of two kilograms of cocaine and received a forty year sentence. He was arrested and convicted together with Maurice Dan Crawford and Tommy McIntosh,[6] the son of Say McIntosh, who would have been a first cousin of Charles M. Hayes. While Tucker was serving as Acting Governor of Arkansas, State Senator William L. Walker, Jr., asked Tucker to exercise executive clemency in favor of Hayes. Tucker sent Hayes a letter denying his application for executive clemency. Later, when Tucker was Governor, under the Arkansas Constitution State Senator Jerry Jewell became Acting Governor whenever Tucker left the state of Arkansas. When Tucker left the state to attend President Clinton's inauguration, Jewell, as Acting Governor, granted executive clemency to Tommy McIntosh. As a result of instructions given by Tucker to his chief of staff, Hayes did not receive clemency from Jewell.

Hayes thereafter received habeas relief and was released from imprisonment. See Hayes v. Lockhart, 989 F.2d 505 (8th Cir. 1993) (unpublished).

Tucker's motion alleged that when Juror Johnson was before the court on voir dire she must have known that Tucker had denied clemency to Hayes, but, when Johnson was asked about any prejudice against any party, she said nothing about Hayes or his history with Tucker.

Tucker's motion alleged that Say McIntosh, Hayes's

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[5] The marriage license stated that Hayes's mother was "Emma McIntosh."

[6] In our opinion affirming the grant of habeas corpus, we recited that Hayes, Tommy McIntosh, and Crawford were arrested together and charged with the same crime. Hayes v. Lockhart, 989 F.2d 505 (8th Cir. 1993) (unpublished).

uncle, had made frequent public demonstrations of hatred and contempt for Tucker, including demonstrations in front of the courthouse. Tucker submitted the affidavits of two Arkansas policemen reporting that Say McIntosh "frequently distributed leaflets attacking Governor Tucker" and "has appeared frequently at public events where Governor Tucker was present, criticizing the Governor, and on occasion been very loud and disruptive." Appended to the affidavits were fliers, said to be representative of those Say McIntosh routinely distributed. The fliers accused Tucker of racism in failing to exercise clemency for a black prisoner sentenced to death and compared Tucker's criminal activity to the prisoner's, labeling Tucker "A Real Thief." One flier stated: "Our governor who has 14 felony indictments will kill an innocent man just for racist reasons, and try to make some white jury sympathetic of his 14 indictments." The flier concluded: "If the governor goes through with the killing of Barry Lee Fairchild, every ounce of blood shed on the streets of Little Rock, the Governor, Jim Guy Tucker, will be sadly responsible for."

Tucker alleged that he had information that Juror Johnson received communications during trial from Hayes and/or Tommy McIntosh regarding the matters on trial, and in support he filed the affidavit of State Senator William L. Walker, Jr., who had requested clemency for Hayes, Tommy McIntosh, and Maurice Crawford. Walker stated that he "personally vigorously advocated to Governor Tucker on behalf of all three men." Walker recounted the story of how Acting Governor Jewell commuted McIntosh's sentence, but not Hayes's. Walker stated, "I know that as a result of action taken by Governor Tucker, Hayes and Crawford remained in prison." Walker said, "Hayes expressed anger over the denial of his applications." Walker said he knew that during Tucker's trial, Hayes told Tommy McIntosh that Hayes's wife, Renee Hayes, was on the Tucker jury. Walker also said that during the course of the trial Tommy McIntosh called him and said, "[W]e have someone on the jury." Walker took McIntosh to mean that the McIntosh family had someone on the jury. Walker said he knew that Tommy McIntosh talked several times with Hayes, and that Hayes discussed the trial with his wife during the trial.

Tucker filed his own affidavit, recounting how he was able to prevent Jewell from commuting Hayes's and Crawford's sentences by instructing his chief of staff to tell Senator Jewell that no commutation could be granted if the prisoner's files were not in his office.

Tucker alleged that if Juror Johnson had revealed her relationship to the Hayes case at voir dire, Tucker could have successfully challenged her for cause. He alleged that her presence on the jury denied him his right to a fair trial.

(3.)

On August 1, 1996, the district court conducted a hearing. Before taking evidence, the court stated that it was persuaded that Tucker had not submitted specific evidence demonstrating impropriety on the part of Juror Johnson or the entire panel and that Tucker had only submitted rank hearsay based on speculation and conjecture. "Erring on the side of caution," however, the court granted a hearing at which the jurors, including Juror Johnson, could be examined under oath to allow the United States to demonstrate that no extraneous evidence entered into the jury room during deliberations. The court stated that it would track the decision of the Eighth Circuit in United States v. Swinton, 75 F.3d 374 (8th Cir. 1996). The court determined that Tucker's counsel would be allowed to cross-examine, but limited such examination to the area developed by the government. Tucker's counsel asked for clarification of the scope of the hearing, stating that Tucker's motion had two thrusts--one that Juror Johnson was not candid on voir dire, and the other that she was "in touch" with Charles Marvin Hayes, whom she married during the trial. The court responded that Tucker would be limited to the extraneous evidence issue, but that Tucker could proffer anything he liked for the Court of Appeals in the form of a summary, but not in the form of questions and answers.

At the hearing, Renee Johnson Hayes testified that at the time she served as juror she did not know that her husband had ever applied for executive clemency while he was in prison. She did not know her husband while he was in prison.

She testified that at the time she served as a juror, she was not aware that Governor Tucker had denied her husband's clemency petition and therefore never told any other juror that Tucker had denied her husband clemency.

On cross-examination, Johnson testified that she had become engaged to marry Hayes in 1994, but they had "never set a date." Tucker's counsel was permitted to establish that she had lived with Hayes, but counsel was not permitted to ask how long she had lived with him. Johnson said she knew when she began to live with Hayes that he had been in the Arkansas prison. She also knew Hayes had an uncle named Say McIntosh, but she did not know him.

Counsel began to inquire about her answer to the jury questionnaire item asking whether "any member of [her] family [had] ever been charged with a crime," but the court prohibited the question on the ground that it was outside the scope of the hearing.

Counsel then asked Johnson whether she was aware that her husband's uncle was picketing outside the courthouse during the trial, telling people that Tucker was a crook; the court again disallowed the question as beyond the scope of the hearing. Johnson said she knew of a mock cemetery Say McIntosh had set up on the south side of Little Rock, but she had not read any signs on it saying that Tucker was a crook, although she passed the cemetery when she was going that direction.

Johnson said she had no contact with Tommy McIntosh. She said she knew that her husband was imprisoned as a result of an incident involving Tommy McIntosh, her husband's cousin, and Maurice Crawford. She couldn't say whether her husband is still in touch with Tommy McIntosh. Tucker's counsel asked whether there had been any phone calls between Tommy McIntosh and her husband, and the court sustained an objection to the question.

Johnson testified that her husband never discussed Governor Tucker with her. Counsel asked whether she was

aware of Say McIntosh's animosity toward Tucker, but the court sustained the government's objection to the question. She said she and her husband never discussed the trial in any manner, "not a word." She said her husband never discussed with her the circumstances under which clemency was granted to Tommy McIntosh, but denied to Hayes himself, nor did he express bitterness about his unjust conviction on the drug charge. The court sustained an objection when counsel asked whether she and her husband had ever discussed his conviction on the drug charge. She answered that she did not tell about her husband's conviction when she filled out her jury questionnaire. When counsel asked if she told about the brother-in-law's conviction, the government objected, arguing that Tucker had waived the right to inquire about the jury questionnaire by not asking about it at voir dire. The court sustained the objection.

Tucker's counsel asked Johnson if she got married over a noon hour during the trial, and Johnson said she really didn't know the time. Counsel asked if it was one of the days when"we had an hour and a half' for lunch, and she said, "I think so." She did not mention to any of the other jurors that she got married over the lunch break. Tucker's counsel asked whether she considered herself part of a family with Charles Hayes and her child before the trial; the court sustained the government's objection to that question.

The government then called the other jurors and asked whether any of them knew before reaching a verdict that Tucker had denied a petition for executive clemency for Renee Johnson's husband, or whether this was discussed in the jury room. All answered no. One juror testified that after the trial was over she had talked with Ms. Johnson about Tucker's position on executive clemency for Hayes. The court sustained an objection to further inquiry about that conversation.

At the conclusion of the evidence, the government stated that the record established that no extraneous matters were injected before the jury.

Tucker's counsel then asked to make his proffer. Counsel stated that Tucker was prepared to prove everything

alleged in the motion papers.

Additionally, counsel offered to prove that when Governor Tucker was out of the state and Jerry Jewell became Acting Governor, Jewell asked for Charles Hayes's clemency file, but that Tucker's staff kept the file away from Jewell so that he did not succeed in granting Hayes clemency. Tucker's counsel stated that there would be testimony that the Hayes-McIntosh family was aware that Tucker's staff prevented Jewell from granting Hayes clemency that day. Counsel additionally stated that he would prove by Juror Johnson that she formed a family with Hayes some time around the beginning of 1994, and that they were living together as man and wife at the time of the voir dire. Tucker's counsel proffered the birth certificate showing the birth of Johnson's child, Taylor, in November, 1995, with the father shown as Charles Hayes. The Hayes-Johnson marriage license and Hayes's prison records were also proffered. Counsel stated that Johnson's sister, Celina, is married to Charles Hayes's brother, Brian Hayes. Counsel offered to prove that the family visits back and forth. Counsel stated that telephone records would show telephone calls between Charles Hayes, Say McIntosh, and Tommy McIntosh from time to time. Tucker's counsel further offered to prove that Renee Johnson's answer to the jury questionnaire about family members who had been charged with crime related to her brother-in-law, who was in prison on a drug charge, and not to her husband.

The court denied the new trial motion, because the court was not persuaded that the jury had access to extraneous evidence in deliberating on the verdict.

(4.)

Tucker argues that his Sixth Amendment right to an impartial jury was violated because Juror Johnson concealed her relationship to Hayes and the McIntosh family and because she was subjected to outside influence. These are two discrete legal theories, calling for proof of different facts. The first theory is juror bias; in other words, when Johnson arrived at voir dire, she had an existing bias that should have disqualified

her from serving as a juror in this case, but that she concealed the bias during voir dire. The second theory is private communication, contact, or tampering with a juror--the allegation that Johnson discussed the trial during its pendency with someone who tried to influence its outcome.

B.
(1.)

Tucker bases his claim of concealed juror bias on McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). In McDonough, after a products liability trial, the plaintiff discovered that one of the jurors had failed to respond to a question during voir dire about whether any one in his family had had any serious accident. Actually, the juror's son had suffered a broken leg in an explosion. The Court of Appeals held that the juror's failure to respond showed bias, because it showed the juror had a particularly narrow concept of what constitutes a serious injury. 464 U.S. at 552. Writing for a plurality of the Supreme Court, Justice Rehnquist stated:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror' s impartiality can truly be said to affect the fairness of a trial.

Id. at 556. Thus, Tucker would have to prove three things about the voir dire: 1) that Juror Johnson answered dishonestly, not just inaccurately;[7] 2) that she was motivated by partiality; and

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[7] The opinions concurring and concurring in judgment in McDonough, representing five justices altogether, state that dishonesty is merely a factor relevant to the ultimate issue of whether a juror is biased. 464 U.S. at 556, 557-58. We have counted the votes in McDonough and concluded: "It would

3) that the true facts, if known, would have supported striking her for cause.

The district court did not allow Tucker to put on evidence on the McDonough claim, but instead limited the new trial hearing to the extraneous evidence theory. The district court has broad discretion in handling allegations that jurors have not answered voir dire questions honestly, and we defer to its discretion in deciding whether a post-trial hearing is necessary. See United States v. Williams, 77 F.3d 1098, 1100 (8th Cir.), cert. denied, 117 S. Ct. 392 (1996). That discretion is not unlimited, however, and a movant who makes a sufficient showing of McDonough-type irregularities is entitled to the court's help in getting to the bottom of the matter. In United States v. St. Clair, 855 F.2d 518 (8th Cir. 1988), the defendant discovered after trial that a juror had not responded to a voir dire question about whether anyone had experience with explosives, although the juror had seven years' such experience. The district court failed to permit the defendant to question the juror under oath "as to his reasons for holding back this pertinent information, and his ability in having reached a guilty verdict without relying on his specialized knowledge." Ices. at 523. We reversed the district court and ordered a new trial. Id. Accord United States v. Boney, 68 F.3d 497, 502-03 (D.C. Cir. 1995) (party with McDonough claim entitled to cross-examine juror; limited inquiry permitted by district court "virtually assured that the hearing would fail to discover any possible prejudice.") Therefore, taking into account the district court's discretion in responding to the situation, we must nevertheless examine Tucker's motion

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thus appear that a juror's dishonesty is not a predicate to obtaining a new trial. The focus is on bias." Cannon v. Lockhart, 850 F.2d 437, 440 (8th Cir. 1988). Cf. United States v. Wright, 119 F.3d 630, 636 (8th Cir. 1997) (McDonough analysis ends once court concludes there was no showing of dishonesty). However, Tucker has briefed his case under the McDonough plurality's standard, and does not ask us to decide whether he could receive a new trial without a showing of dishonesty.

papers and proffer of evidence to determine if he made a sufficient showing to entitle him to a McDonough hearing.

In his new trial motion, Tucker contended that Juror Johnson deceived the court by not responding to the general questions about sources of bias and by giving an incomplete response to the question about whether "any member of your family" had ever been charged with a crime. Tucker contended that Johnson shared a familial relationship with Hayes in fact if not in law, and that this relationship was so important that Johnson deceived the court in not revealing Hayes's conviction or her relationship to him.

Although Tucker asks us to order a new trial, the present state of the record is not complete enough to warrant such a drastic step. Any evidence that Johnson deceived the court is only circumstantial. As for her failure to respond to the numerous general questions about sources of bias, the only direct evidence is that Johnson herself was unaware of any grudge her husband and his family harbored against Tucker. She testified that she did not know Hayes until he got out of jail, and that at the time she served as a juror, she did not know Governor Tucker had denied her husband's clemency petition. Even more categorically, she denied that she and her husband had ever discussed Governor Tucker. She testified they never discussed the trial in any manner, "not a word." Significantly, one fellow juror testified that after the trial she and Johnson had discussed Tucker's denial of clemency to Hayes, but the district court cut off questioning before counsel could find out what Johnson said. Tucker had subpoenaed Hayes, but the court did not permit Tucker to examine him as part of the proffer.

On this record, we cannot say that Tucker has established that Johnson deceived the court, but only that he made enough of a showing to entitle him to a hearing and findings of fact on this issue. Johnson's own testimony indicates that she was in a state of complete ignorance about events that nearly caused her husband to spend much of his life in prison. On the other hand, Tucker offered affidavits that indicated that Johnson's husband and extended family were quite preoccupied with those very events. According to

Tucker's proffer, Hayes expressed anger to Walker over the denial of his applications for clemency. During the trial, Hayes's uncle Say McIntosh was outside the courthouse decrying Tucker. Tucker's affidavits contain fliers McIntosh distributed in Little Rock, characterizing Tucker's denial of clemency to a black prisoner as racist and juxtaposing the innocence of the prisoner with Tucker's guilt. One flier specifically derides Tucker's expectation of a "sympathetic" white jury. According to Tucker's proffer, Say McIntosh's acrimony arose at least in part from Tucker's role in denying Hayes and Crawford clemency and in stymieing their backup plan of receiving relief from Jewell when Tucker left the state. The information in Tucker's proffer is very difficult to reconcile with Johnson's testimony that she knew nothing about her family's grudge against Tucker. Tucker has raised enough question about what Johnson knew at the time of voir dire to entitle him to a full hearing on this issue, including crucial credibility determinations.

Apart from her failure to respond to questions about whether she had any bias, Tucker also contends that Johnson intentionally failed to identify Hayes as a family member in order to conceal her relationship with him. Specifically, Tucker argues that she deceived the court in failing to report Hayes's conviction in the questionnaire item about whether she had any family member who had been charged with a crime. Johnson testified at the hearing that her response on the questionnaire, "Drug conviction--guilty (serving four years)," did not refer to Hayes, who originally had a forty-year sentence and who was not in jail at the time of voir dire. Counsel offered to prove that Johnson's questionnaire answer referred to her brother-in-law, who was in prison on a drug charge. The court would not permit Tucker's counsel to ask Johnson whether she considered herself to be part of a family with Hayes at the time of the voir dire.

The government argues that Johnson's answer to the questionnaire was accurate because she was not married to Hayes at the time of the voir dire and therefore he was not her family. The government's argument receives some support from United States v. Wright, 119 F.3d 630, 636 (8th Cir.

1997), in which a juror failed to respond to a question asking whether he was related to any "law enforcement officer." His uncle was a tribal children's court judge. We said the juror "could have honestly believed" that a tribal court judge was not a law enforcement officer, so we rejected the defendant's claim of bias without a hearing. Id. (citing Bolin v. Black, 875 F.2d 1343, 1350 (8th Cir.) no need for hearing to ascertain juror's subjective honesty when juror's answer was literally true), cert. denied, 493 U.S. 993 (1989)). We do not believe Wright represents a per se rule that if a question is ambiguous, an answer that is correct under any interpretation of the question cannot be a "false" answer under McDonough. Rather, in Wright the court made an assessment that the answer was a reasonable one. Moreover, the alleged misrepresentation in Wright was not particularly material and probably would not have led to a successful challenge for cause. See United States v. Humphreys, 982 F.2d 254, 261 (8th Cir. 1992) (to obtain new trial, must show misrepresentation showed actual bias or prejudice), cert denied, 510 U.S. 814 (1993); Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1062 (9th Cir. 1997) (dishonesty limited to collateral matters; no relief granted).

In contrast to the facts in Wright, Johnson was alleged to have concealed a relationship of great significance to her and one that would have been of great significance to Tucker if he had known of it. According to Tucker's proffer, Johnson lived with Hayes, had a child with him, and was only a few days away from marrying him at the time of voir dire. Whether a juror in such a position would either understand Hayes to be included in the term "family" or at least would understand that the questionnaire meant to ask about people with whom she shared such a close relationship, is, we believe, an issue that requires further detailed inquiry. Therefore, we hold that Tucker made a sufficient showing to entitle him to a McDonough hearing on whether Johnson meant to deceive the court in her questionnaire answer.

If Tucker can prove that Johnson deceived the court at voir dire, he will also have to prove that she did so because of partiality, rather than for some reason that is irrelevant to the fairness of the trial. "The motives for concealing information

may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." McDonough, 464 U.S. at 556. In St. Clair, we emphasized that the court should have questioned the juror to find out "his reasons for holding back . . . his pertinent information," 855 F.2d at 523. If Tucker can prove the facts alleged in his proffer, there will be a sufficient showing to support a finding that the incomplete answer was motivated by partiality. However, it is also possible that the evidence at a hearing could support a finding of some other motivation for incomplete answers, such as embarrassment. See United States v. Boney, 68 F.3d at 502 (once dishonesty shown, need further inquiry to determine whether dishonesty motivated by bias); United States v. Boney, 977 F.2d 624, 634-35 (D.C. Cir. 1992) (same).

Finally, under the McDonough test, Tucker must prove that if Johnson had given complete and honest answers at voir dire, she would have been subject to challenge for cause.[8] There are various grounds for such a challenge, see 28 U.S.C. § 1865 (listing conditions that would disqualify a person for jury service); Humphreys, 982 F.2d at 260-61 (claim of juror disqualification because of felon status). The ground Tucker alleges is partiality, known at common law as a challenge for favor (which coincides to a large extent with the second element of the McDonough test). "[T]o challenge for cause, a party must show actual partiality growing out of the nature and circumstances of [the] particular case." United States v. Bascope-Zurita, 68 F.3d 1057, 1063 (8th Cir. 1995) (citation and internal quotations omitted), cert. denied, 116 S.Ct. 741 (1996). The decision of whether a particular juror should be excused for bias is entrusted to the sound discretion of the district court, see Bascope Zurita, 68 F.3d at 1063, although of

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[8] This is a shorthand way of referring to both the common law categories of challenge for cause and challenge for favor. See 28 U.S.C. § 1870 (1994) (recognizing challenges for cause and favor); United States v. Boney, 977 F.2d 624, 641 (D.C. Cir. 1992)(Randolph J., concurring) (explaining distinction between challenge for cause, based on lack of statutory qualification, and challenge for favor, based on bias).

course that discretion has limits. See Kirk v. Raymark Industries. Inc., 61 F.3d 147, 152-56 (3d Cir. 1995) (reversing district court for failure to strike jurors whose comments showed they were biased), cert. denied, 116 S.Ct. 1015 (1996). The matters asserted in Tucker's proffer would support a decision by the district court to strike Juror Johnson for cause. See Cox v. Norris, No. 97-1280, 1997 WL 790331 at *5 (8th Cir. Dec. 29, 1997) ("ample reason" to excuse juror for cause where "she was acquainted with, and had reason to have animosity toward, the prosecution."); United States v. Campbell, 845 F.2d 782, 786 (8th Cir.) (juror properly excused for cause where parents-in-law had worked for defendant's political campaign), cert. denied, 488 U.S. 965 (1988); United States v. Perkins, 748 F.2d 1519, 1532 (11th Cir. 1984) (challenge can be for "remote" relationship with party).

Tucker has therefore made a sufficient showing of a McDonough claim to entitle him to a hearing on his claim that he was denied his right to an impartial jury.

The government contends that Tucker waived Juror Johnson's bias by failing to ask questions about it in voir dire. Failure to ask the questions necessary to expose bias at voir dire can result in waiver of objections to a juror. See United States v. Williams, 77 F.3d 1098, 1100-01 (8th Cir.), cert. denied, 117 S.Ct. 392 (1996); Johnson v. Armontrout, 961 F.2d 748, 754 (8th Cir. 1992) (if defendant fails to object to juror, has Sixth Amendment claim only if proves actual bias). Nevertheless, the government's argument is beside the point, because in this case Tucker asked the questions and he contends that Johnson gave incorrect or incomplete responses.[9]

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[9] Tucker also argues that the court erred in refusing to strike another juror, Jerry Haustein, whose responses to the questionnaire were inconsistent with a defendant's right to silence and the presumption of innocence. After the questionnaires had been completed, Tucker moved to strike Haustein on the basis of the questionnaire. The district court did not grant the motion. The district court then held a voir dire hearing, at which the parties were permitted to ask the jurors

Tucker contends that he has made a showing sufficient to compel a finding of partiality and that we should reverse his convictions outright. To the contrary, we have a woefully incomplete record, with most of Tucker's allegations supported only by his counsel's narrative offer of proof. We cannot anticipate what facts a full hearing may bring out and what credibility determinations the district court will make. We therefore reject Tucker's suggestion that we reverse or grant a new trial, and instead remand to the district court for a hearing on the issues we have outlined.

(2.)

Tucker also contends that the district court wrongly prevented him from proving that Juror Johnson was subjected to outside influence during the trial. Before the hearing, the district court stated that it was convinced that Tucker had "not submitted any specific evidence demonstrating any impropriety on the part of juror Johnson, or the entire panel, but has submitted rank hearsay." However, out of abundance of caution, the district judge allowed Tucker to examine Johnson and the other jurors on the model of the hearing prescribed in United States v. Swinton, 75 F.3d 374, 381-82 (8th Cir. 1996), another case in which he served as trial judge. Swinton involved the jury's consideration of an extraneous fact not in evidence, rather than an allegation that a juror was subjected to outside influence, as in this case. Id. at 381. Following the

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about problematic answers to the questionnaires. The district court excused some jurors after their oral responses made it clear that they were biased, while in other cases, the oral examination cleared up problems that appeared in the questionnaires. Tucker did not question Haustein about the questionnaire answers. After the district court refused to strike Haustein on the basis of the answers to the questionnaire items, which could have been confusing to a lay person, it was incumbent on Tucker to press his objection at the hearing. His failure to do so resulted in waiver of the objection. See United States v. Hoelscher, 914 F.2d 1527, 1542-43 (8th Cir. 1990), cert. denied, 500 U.S. 943 (1991).

Swinton model, the district court focused on what was said in the jury room, but largely excluded evidence of what was said to Juror Johnson outside the jury room. Tucker offered the affidavit of Arkansas State Senator Walker stating: "I know that Tommy McIntosh talked several times with Hayes and that Hayes discussed the trial with his wife during the trial." However, the court did not allow Tucker to call Walker, Tommy McIntosh, or Charles Hayes to substantiate these assertions.

To gain a new trial on the ground of juror misconduct, a movant must present evidence that is not barred by Federal Rule of Evidence 606(b) and that establishes grounds recognized as adequate to overturn a jury verdict. See United States v. Caldwell, 83 F.3d 954, 956 (8th Cir. 1996).

Rule 606(b) specifically allows a juror to testify "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

When there has been an outside intrusion into the jury's privacy and secrecy during trial, a party is entitled to a new trial if he has been prejudiced by the impropriety. Under Remmer v. United States, 347 U.S. 227 (1954) (Remmer I):

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and direction of the court made during the trial, with full knowledge of the parties.

Id. at 229; accord Caldwell, 83 F.3d at 956; United States v. Melius, 123 F.3d 1134, 1139 (8th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998). Our circuit does not apply the presumption shifting the burden of proof to the government if the contact

pertained to outside legal advice, not extraneous facts. See United States v. Hall, 85 F.3d 367, 371 (8th Cir. 1996). We do not have sufficient facts before us to ascertain whether the presumption of prejudice should apply, since Walker's affidavit does not reiterate the substance of the alleged communications between Johnson and Hayes. However, the type of contact suggested by the record is neither outside legal advice nor exposure to extraneous facts, but private communication, contact, or tampering. Tampering was exactly the sort of contact involved in Remmer I, in which the Supreme Court stated the presumption rule. See 347 U.S. at 229. But whether the presumption shifts the burden of proof to the government or not, the ultimate question is the same: "Did the intrusion affect the jury's deliberations and thereby its verdict?" United States v. Olano, 507 U.S. 725, 739 (1993).

We defer to a district court's discretion in deciding how to handle allegations of intrusions on the jury. See Caldwell, 83 F.3d at 957; United States v. Williams, 97 F.3d 240, 246 (8th Cir. 1997). However, if a party shows that outside contact with the jury presents a reasonable possibility of prejudice to the verdict, he is entitled to a hearing on the matter. See Remmer, 347 U.S. at 230; Rushen v. Spain, 464 U.S. 114, 119-20 (1983) (per curiam); Smith v. Phillips, 455 U.S. 209, 215 (1982); see generally United States v. Madrid, 842 F.2d 1090, 1093-94 (9th Cir.), cert. denied, 488 U.S. 912 (1988); 26 Moore's Federal Practice ~ 633.07[I] and n.3 (Matthew Bender 3d ed. 1997). The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Smith, 455 U.S. at 215. The Eleventh Circuit has summarized its cases on the parameters of the district court's discretion in investigating allegations of juror misconduct:

> Examination of all of the cited authorities . . . leads us to the conclusion that the cases fall along a continuum focusing on two factors. At one end of the spectrum the cases focus on the certainty that some impropriety has occurred. The more speculative or unsubstantiated the allegation of misconduct, the less the burden to

> investigate . . . . At the other end of the continuum lies the seriousness of the accusation. The more serious the potential jury contamination, especially where alleged extrinsic influence is involved, the heavier the burden to investigate.

United States v. Caldwell, 776 F.2d 989, 998 (11 th Cir. 1985). In sum, the depth of investigation required depends on both the gravity of the alleged misconduct and the substantiality of the movant's showing of misconduct.

In this case, Tucker presented the affidavit of Walker, that Walker had knowledge that Hayes and Johnson had talked about the case. Walker's affidavit must be contrasted to the anonymous tips discounted by the Eleventh and Fifth Circuits. See Caldwell, 776 F.2d at 999; United States v. Sedigh, 658 F.2d 1010, 1013-14 (5th Cir. 1981), cert. denied, 455 U.S. 921 (1982). Significantly, Walker had championed Hayes's cause in the effort to obtain clemency, and Tucker had denied his request. Walker's earlier alliance with the McIntosh-Hayes family gives added credence to his report that they have engaged in wrongdoing.

The background of Walker's assertions makes the alleged misconduct far graver than an ordinary case of husband and wife communication during trial. Cf. Caldwell, 83 F.3d at 956 (allegation that a juror's husband was present in the jury room was too vague to warrant further investigation); United States v. Williams-Davis, 90 F.3d 490, 495-99 (D.C. Cir. 1996) (juror's contact with husband harmless, since juror did not appear to be influenced by husband's "two cents' worth"), cert. denied, 117 S. Ct. 986 (1997). The allegations of ex parte contact must be viewed in light of the extraordinary saga of Hayes's attempts to gain clemency; Tucker's frustration of those attempts directly and then by hiding Hayes's file from Jewell; and the McIntosh family's campaign against Tucker. With these facts in the background, the assertion that Johnson and Hayes had discussed the case during the trial must be taken as an allegation of serious misconduct, with a significant potential for prejudice to Tucker. See Swinton, 75 F.3d at 381 (juror's

statement that another juror said defendant had criminal record holds sufficient potential for prejudice to require full hearing).

The district court's investigation of the misconduct focused on whether the contamination was spread throughout the jury, but the court foreclosed a thorough inquiry into the existence and effect of the alleged communication to Johnson. The district court underlined its narrow view of the issues presented in its written order denying Tucker's new trial motion: "Each juror, under oath, denied knowledge of Tucker's action in denying clemency of Johnson's husband, and stated that the matter was never discussed during deliberations. Hence, the Court finds that no extraneous prejudicial information was improperly brought to the jury's attention and that no outside influence was improperly brought to bear upon any juror." The question of prejudice depends on whether "there is any reasonable chance that the jury would have been deadlocked or would have reached a different verdict but for the fact that even one reasonable juror was exposed to prejudicial extraneous matter." United States v. Hall, 116 F.3d 1253, 1255 (8th Cir. 1997) (emphasis added), pet'n for cert. filed, No. 97-7602 (Nov. 19, 1997). Therefore, prejudice is possible even if Johnson was the only juror to be contaminated.

In extraneous evidence cases, we have looked to see the extent and timing of jury exposure to the extraneous fact. See United States v. Blumeyer, 62 F.3d 1013, 1017 (8th Cir. 1995), cert. denied, 116 S.Ct. 1263 (1996); Hall, 85 F.3d at 371. This is simply part of the calculation in determining how much weight to accord one improperly received fact in the context of a trial's worth of other facts. Contamination of a different kind occurs when, rather than being exposed to a fact not in evidence, a juror is subjected to psychological pressure by an outsider trying to coopt that juror's vote. In such a case, the effect on the particular juror is intense and can be harmful to the litigants, even though the rest of the jury remains unaware of the impropriety and even though no extraneous evidence is admitted. For instance, in Remmer v. United States, 350 U.S. 377 (1956) (Remmer II), the Supreme Court vacated the conviction and ordered a new trial because an outsider had made an overture of a bribe to one juror. The district court had

found that the incident was harmless because it did not affect the integrity of the jury's deliberations. Id. at 379. The Supreme Court reversed, holding that the bribery attempt did indeed affect the state of mind of the one juror involved, and that this deprived the defendant of a fair trial. "[The juror] had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." Id. at 382. More recently, in United States v. Cheek, 94 F.3d 136 (4th Cir. 1996), the Fourth Circuit held that a habeas petitioner was entitled to relief because of an implicit bribery attempt directed at one juror by a co-defendant. On habeas, the district court held the incident was innocuous because the juror was not exposed to extraneous facts, he did not tell the other jurors about the incident, and he testified that he listened to all the evidence and based his vote on the evidence. Id. at 141. The Fourth Circuit reversed, holding that the evidence showed the juror was "devastated and fearful" after the incident. Id. at 144. "Objectively, there is at least a reasonable possibility that the extraneous contact affected the verdict." Id. Similarly, in United States v. Maree, 934 F.2d 196, 202 (9th Cir. 1991), the Ninth Circuit held that there was actual prejudice where a juror was subjected only to "aggressive" comments on the case by her friends, without any additional extraneous facts or contamination of the rest of the jury. See also Church v. Sullivan, 942 F.2d 1501, 1508 (10th Cir. 1991) (habeas petitioner entitled to hearing on whether jurors were exposed to jailer's wife's expressions of moral outrage); Stockton v. Virginia, 852 F.2d 740, 742, 746 (4th Cir. 1988) (habeas granted where jurors exposed to opinion in diner that "they ought to fry" petitioner), cert. denied, 489 U.S. 1071 (1989). Thus, a hearing limited to the issues of whether the other jurors were exposed to extraneous facts was not suited to the kind of impropriety alleged in this case--intense emotional pressure brought to bear on one juror.

Johnson testified that she and her husband did not talk about the case during the trial, and the other jurors testified that she had not mentioned anything about her husband. However, the court denied Tucker the opportunity to test that evidence by

examining Walker, Tommy McIntosh, and Charles Hayes, whom Tucker has reason to believe could tell a different story from Juror Johnson's. We conclude that a defendant who makes an allegation of serious misconduct by a juror, supported by evidentiary materials with significant indicia of reliability, is entitled to a more thorough investigation of his complaint than merely asking the juror whether he committed the misconduct. In United States v. Brantley, 733 F.2d 1429, 1439 (11th Cir. 1984), cert. denied, 470 U.S. 1006 (1985), after an allegation that one juror had informed the others of a fact not in evidence, the district court questioned the juror, who denied the misconduct. The court only permitted the parties to submit written questions and refused to ask many of the questions submitted by counsel. The Eleventh Circuit held that a more searching inquiry was required, since the juror's "natural inclination would be to deny making those remarks." Id. at 144041. See also United States v. Money, 68 F.3d at 502-03. We do not suggest that a juror's testimony on the subject of his own conduct is "inherently suspect," Smith, 455 U.S. at 217 n.7, but only that, since other sources of evidence are available, Tucker should be allowed to use them.

We therefore remand with instructions that the district court permit Tucker a hearing on the private communication, contact, or tampering issue, with the opportunity to examine Walker, Tommy McIntosh, and Hayes on the subject of private communications to Juror Johnson during trial and the effect of any such communications on Johnson's ability to serve impartially.

II.

Tucker contends that there was not sufficient evidence to convict him.

In reviewing a claim of insufficiency of the evidence, we view the evidence in the light most favorable to the government, with all reasonable inferences and credibility determinations made in support of the jury's verdict. See Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Liebo, 923 F.2d 1308, 1311 (8th Cir. 1991). We must uphold

the verdict if any reasonable jury could have found the elements of the crime beyond a reasonable doubt. Lieb , 923 F.2d at 1311. Conversely, we will reverse only if the jury must have had a reasonable doubt about an essential element of the crime. Id.

Additionally, once the existence of a conspiracy has been established, even slight evidence connecting a particular defendant to the conspiracy will suffice to prove involvement. See United States v. Maza, 93 F.3d 1390, 1399 (8th Cir. 1996), cert. denied, 117 S. Ct. 1008 (1997).

Tucker attacks his conspiracy conviction,[10] saying that there is no evidence that he was anything but a bystander to a conspiracy between Hale and James McDougall. Tucker contends that the conspiracy was said to be for the benefit of "the political family," and there was no reliable evidence that Tucker was related to that family. This argument ignores the whole context of the "political family" remark. At the same meeting, indeed in the same sentence in which Hale said McDougall referred to the "political family," McDougall said specifically, "Jim Guy is going to need some funds..." There is no ambiguity about whether the conspiracy, as reported by Hale, was meant to include and benefit Tucker.

Tucker also points out that on cross examination, Hale undermined his own testimony about the meeting around Tucker's kitchen table. Tucker's counsel asked Hale about a television interview he had given about when the "political family matter" first came up, in which he indicated that it may have been in a phone call or meeting after that evening meeting

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[10]To prove a conspiracy, the government must prove that "there was an agreement to achieve some illegal purpose, that the defendant knew of the agreement, and that the defendant knowingly became a part of the conspiracy." United States v. Bass, 121 F.3d 1218, 1220 (8th Cir. 1997). Additionally, one of the conspirators must have acted to effect the object of the conspiracy. United States v. Dolan, 120 F.3d 856, 868 (8th Cir. 1997).

around the kitchen table.

Q: But you don't know whether it came up with Jim Guy there or not, do you?
A: Not positive. You're right.

This uncertainty is powerful ammunition that could have severely damaged Hale's credibility in front of the jury. However, we believe it stops short of rendering Hale's testimony insufficient to support the verdict. Hale's credibility was for the jury to determine. Even without Tucker's presence for the "political family" remark, Hale's testimony still establishes that he, McDougall, and Tucker arranged the Castle Sewer and Water transaction so as to conceal the fact that Capital Management was providing the down payment for a business in which Tucker made no investment. According to Hale, the Castle Sewer and Water plan was first revealed to him by Tucker himself, who said that he was undertaking the transaction because it was urgent for Madison to divest itself of the sewer and water system to avoid trouble with the regulators. Hale said he talked to Tucker about it more than once and that Tucker said: "We need to get this loan done for McDougall. He's really got problems and we need to at least show some type of due diligence." Tucker described to Hale the transaction, including the hundred percent financing of the purchase, and Tucker "prepared most all of the [loan] documents." Though the conversation around Tucker's kitchen table may have summed up the government's theory of the conspiracy in a nutshell, the case does not stand or fall on Tucker's presence at one conversation. "The agreement which lies at the heart of any conspiracy case need not, of course, be expressly stated. Instead, the Government must only establish a tacit understanding between the parties, and this may be shown wholly through the circumstantial evidence of [the defendant's] actions." Bass, 121 F.3d at 1220 (internal quotation omitted). Hale's testimony, together with the transactions that took place, provides abundant evidence of a conspiracy to extract money from Madison and Capital Management by fraud. Once the conspiracy is established, even slight evidence will suffice to connect the defendant with the conspiracy. Maza, 93 F.3d at 1399. There is more than slight

evidence that Tucker voluntarily linked himself with the scheme.

Tucker contends that he was not proved to be a member of the conspiracy because he had no "stake" in the cycle of benefits conferred by the interlocked transactions. Tucker contends he did not receive any benefit from the Etta's Place transaction,[11] because the Castle Sewer and Water loan closed on February 28, 1986, and the Etta's Place proceeds were not deposited to Capital Management's account until April 2, 1986. This argument ignores the role of James McDougall as source of the Etta's Place money and ultimate beneficiary of the Castle Sewer and Water loan. According to Hale, Tucker's purchase of the sewer and water system was an accommodation of McDougall's need to get ownership of the utility out of Madison Financial. Therefore, Hale's fraudulent loan to Tucker to finance the purchase of the sewer and water system was a way of benefitting McDougall indirectly. In turn, McDougall was about to finance an extremely lucrative transaction for Hale's benefit. Participation in the Castle Water and Sewer transaction may not have been to Tucker's great advantage, but there is certainly evidence that he was a knowing participant in the scheme, rather than a bystander. It is not necessary to show that Tucker profited in order to prove he was part of the conspiracy.

Moreover, it is not true that Tucker had nothing to gain from the conspiracy, since there was evidence of a pattern of favors and reciprocal obligations running between James McDougall and Tucker. For instance, Hale said that on the night of the first meeting out at Castle Grande, it was mentioned that McDougall was going to let Tucker put his cable television company at Castle Grande. There was also

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[11] As we already stated, the jury acquitted Tucker on the substantive charges arising out of the Etta's Place transaction. Acquittal by the jury on those charges does not affect our analysis on the sufficiency of the evidence of the conspiracy charge. See United States v. Suppenbach, 1 F.3d 679, 681 (8th Cir. 1993).

evidence that McDougall had Madison loan Tucker money when Tucker was liable on a note in default at another institution. However, the money did not come without strings. Tucker had to buy from McDougall the 34 acres near Castle Grande that Hale described as a "turkey." Hale described a symbiotic relationship in which benefitting one conspirator would eventually work to the good of all.

Tucker also argues that the mailing of the Form 1031 did not satisfy the mailing element of 18 U.S.C. § 1341,[12] citing United States v. Maze, 414 U.S. 395 (1974). We have dealt at length with the identical argument in our decision in the case of Tucker's co-defendant, Susan McDougall, filed today, and have concluded that the mailing of the Form 1031's did indeed perpetuate a fraud. See United States v. McDougall, No. 963270, slip op. at p. (8th Cir., 1997). We will not repeat what we have written there. The evidence showed that Tucker himself prepared the loan application hiding the fact that the purpose of the Castle Sewer loan was to make the down payment on a facility for a corporation in which there was no investor money, only loans from Madison and Capital Management. In this context, a jury could certainly conclude that Hale's incorporation of the "working capital" language

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[12] 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . for the purpose of executing such scheme . . . places in any post office . . . any matter or thing whatever to be sent or delivered by the Postal Service . . . or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both.

The statute requires proof of (1) a scheme to defraud; (2) use of the mails for the purpose of executing such scheme; and (3) intent to defraud. United States v. Midtaune, 589 F.2d 370, 374 (8th Cir.), cert. denied, 442 U.S. 917 (1979).

from Tucker's application into the Form 1031 perpetuated a falsehood to avoid scrutiny by the Small Business Administration.

Finally, Tucker contends that the loan application offered into evidence was superseded by a different application, which was lost between the date of the transaction and the trial. He points to records showing that an associate in his firm spent time preparing a loan application for Castle Sewer and Water Corp. after the date Tucker submitted the application that was in evidence at trial. The billing records are a very thin reed on which to hang a theory of multiple, superseding loan applications, especially since the associate in question does not remember any such superseding application and since the trial revealed other instances of backdating. At any rate, Tucker's argument is that the billing records could support an alternative version of the facts in which the Castle Sewer and Water Corp. transaction would not be fraudulent. However, under our standard of review of a jury verdict, we must resolve disputed facts in favor of the verdict, not against it. "The evidence need not exclude every reasonable hypothesis except that of guilt." United States v. Termini, 992 F.2d 879, 881 (8th Cir. 1993). There is sufficient evidence to support the conviction.

III.

Tucker argues that several evidentiary rulings were abuses of discretion. First, he argues that the district court abused its discretion in letting the government impeach James McDougall with a prior statement to the FBI that Tucker was a "thief who would steal anything that wasn't nailed down." Tucker did not testify, so his credibility was not in issue. McDougall had initially testified that he had known Tucker thirty-five years and knew of nothing Tucker had ever done that was illegal. During the course of his testimony, McDougall denied participating in the various crimes he was accused of, stating that he had not entered a conspiracy with Tucker or committed wire fraud, etc. In cross-examination, the government gave notice that it wanted to use the statement to the FBI for impeachment. Tucker objected vehemently, but the court permitted the use of the statement. The court gave a

cautionary instruction:

> The government is about to elicit certain information from Mr. McDougall to develop from a document a statement previously made by Mr. McDougall [that] might be inconsistent with the testimony that he has given already. Now, you are admonished, and I want to make this crystal clear, it is being received for one purpose and one purpose only, impeachment.

The district court's decision to admit evidence is reviewed only for abuse of discretion. See United States v. Fairchild, 122 F.3d 605, 610 (8th Cir. 1997), pet'n n for cert. filed, No. 97-7312 (Dec. 22, 1997). In this case, the impeachment was not a perfect fit with the statements the government now points to as prior inconsistent statements. The statement in the FBI report was vague, amounting to little more than name-calling, and was not directly contrary to, for instance, McDougall's statement that he and Tucker had not committed wire fraud. Nevertheless, we cannot say that the decision to allow the impeachment was an abuse of discretion. Moreover, the limiting instruction channeled the jury's use of this evidence. See United States v. Delpit, 94 F.3d 1134, 1144-45 (8th Cir. 1996).

Tucker also contends the district court abused its discretion in allowing testimony by William Watt that he did not believe a statement Tucker made about one of the transactions on which Tucker was acquitted. The district court admitted this evidence as lay opinion under Fed. R. Evid. 701. Regardless of whether this was an appropriate use of Rule 701, we can say that in light of Tucker's acquittal on the substantive count and in the context of the entire trial, admission of Watt's statement was harmless beyond a reasonable doubt. See Fed. R. Crim. P. 52(a); United States v. Cortez, 935 F.2d 135, 140 (8th Cir. 1991) (opinion as to veracity of witness was harmless error), cert. denied, 502 U.S. 1062 (1992).

IV.

Tucker contends that the district court erred in denying his request for jury instructions about various regulatory requirements. Tucker contends that these instructions were appropriate because there had been testimony that various transactions were structured to avoid violating regulations or to conceal such violations.

A defendant who requests a specific instruction is entitled to an instruction that conveys the substance of his request if his request is timely, it is supported by evidence in the case, and is a correct statement of the law. See United States v. Darden, 70 F.3d 1507, 1544 (8th Cir. 1995), cert. denied, 116 S. Ct. 1449 (1996). The defendant is not entitled to any particular formulation, as long as the instructions given adequately convey the law. Id. We review the district court's decision to give or deny an instruction for abuse of discretion, considering the court's ruling in the context of the entire charge. See United States v. Lynch, 58 F.3d 389, 391 (8th Cir. 1995); United States v. Parker, 32 F.3d 395, 400 (8th Cir. 1994).

The court denied Tucker's requests for instructions about the substance of particular regulations, but gave an instruction that was actually more to the point. The court instructed the jury:

> You have heard testimony during this trial concerning certain federal and state regulations of financial institutions, including regulations of the Small Business Administration, the Federal Home Loan Bank Board, and regulations of the State of Arkansas concerning savings and loan institutions. Such federal and state regulations are civil, not criminal laws. Therefore, violation of any such regulations should not be considered by you as a violation of the criminal law.

This instruction correctly told the jury that regulatory violations were not elements of the charged crimes. In contrast, Tucker's proposed instructions would have required even further instructions to avoid misleading the jury and would have

focused the jury's attention on collateral issues. Tucker introduced evidence about one of these regulations; this was the appropriate way to undermine what he considers to be misleading testimony by Hale about the effect of such regulations on Tucker's actions. The district court did not abuse its discretion in denying the requested instructions.

Tucker contends the district court erred in denying his proposed instruction number 7, to wit: "An act is done 'wilfully' if done voluntarily and intentionally with the purpose of violating a known legal duty."[13] Thus, Tucker wanted the court to instruct the jury that Tucker had to intend to break the law. "The critical inquiry [in mail fraud] is not whether [the defendant] intended to break the law, but, rather, whether he intended to defraud . . . ." United States v. Wicker, 80 F.3d 263, 267 (8th Cir. 1996) (internal quotations omitted). Tucker's requested instruction would have misled the jury, and therefore the court did not err in declining to give it.

* * *

We conclude that the district court did not err with respect to the issues discussed in parts 11, 111 and IV, but remand with instructions that the district court conduct a full hearing on the issues discussed in part I pertaining to Juror Johnson.

BEAM, Circuit Judge, concurring in part and dissenting in part,

I concur in Parts II, III, and IV of the court's decision. However, I respectfully dissent from Part I because, in my view, the district court did not err in finding that Tucker had failed to raise reasonable grounds for a more searching post-trial hearing than that conducted. Indeed, under clearly

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[13] Section 1341 does not use the word "wilfully." Cf. United States v. Jain, 93 F.3d 436, 440-41 (8th Cir. 1996) (looking at Medicare anti kick-back statute's use of "wilfully" to decide whether court should give instruction), cert. denied, 117 S. Ct. 2452 (1997).

established law, the pleadings and papers advanced by Tucker required no hearing whatsoever. Thus, the court violates the applicable "abuse of discretion" standard of review with this remand.

The district court determined that Tucker failed to submit "any specific evidence demonstrating any impropriety on the part of juror Johnson, or the entire panel, but has submitted rank hearsay." Tr. of Hr'g at 3 (August 1, 1996). The district court characterized the Tucker argument as "based on speculation and conjecture." Id. Everything before the court, on appeal, supports the district court's conclusion. The court, in conducting its erroneous analysis, has converted conclusory allegations by Tucker into findings of fact at odds with evidentiary rulings and credibility determinations reached by the district court, the tribunal with sole discretion to resolve these issues. See Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring).

Tucker presents a concoction of speculation and conjecture based on the purported state of mind of one Robert "Say" McIntosh, juror Johnson's uncle by marriage whom she did not know, and of Charles Hayes, Johnson's fiancé turned husband, a person that she apparently had little if anything to do with at times relevant to most of Tucker's allegations. The issue is, of course, the state of mind of Johnson and no one else. Because Tucker advanced only speculative allegations with regard to Johnson's state of mind, the court's remand order requires it to make unsupported factual and legal leaps of unprecedented proportions.

The court correctly observes that Tucker's motion-alleging that his Sixth Amendment right to an impartial jury requires a new trial-raises two separate theories. First, Tucker alleges that Johnson harbored a bias against him and that she failed to answer honestly certain questions during voir dire that would have revealed her bias. Next, Tucker contends that Johnson received improper communications during the trial. The district court refused to conduct a post-trial hearing into the juror bias claim and conducted a limited inquiry into the improper communications allegation. Because an appellate

court is generally not the proper tribunal to vacate a verdict and order a new trial, see McDonough Power Equip Inc. v Greenwood, 464 U.S. 548, 551 n.3 (1984), we must only decide whether the district court erred in not conducting a more extensive investigation into Tucker's allegations. I find no error in that regard.

The mere fact that post-verdict allegations of juror bias or misconduct are made does not automatically create a right to a hearing. See also McDonough, 464 U.S. at 556 (Blackmun, J., concurring) (stating that the decision to conduct a post-trial hearing to determine juror bias remains within the "trial court's option"); United States v. Moses, 15 F.3d 774, 778 (8th Cir. 1994) (same). Clearly, our limited judicial resources prevent us from ferreting out every instance of alleged bias or otherwise guaranteeing perfect trials. See Lutwak v. United States, 344 U.S. 604, 619 (1952). Needless posttrial interviews of jurors could result in juror harassment and cause grave danger to the effectiveness of our jury system. See Tanner v. United States, 483 U.S. 107, 120 (1987) (observing that the jury system would likely not survive efforts at perfection).

Thus, before ordering a post-trial hearing, the district court must determine whether an allegation of concealed juror bias or misconduct even warrants further investigation. See United States v. Caldwell, 83 F.3d 954, 957 (8th Cir. 1996). We give broad deference to the district court in this determination because it is better positioned to consider the relevance and materiality of supporting facts and the possibility of bias. Id. The district court's duty to investigate is primarily determined by the nature of the losing litigant's allegations supporting the claim of bias or misconduct and the severity of the allegations. See United States v. Caldwell, 776 F.2d 989, 998 (11th Cir. 1985). In the absence of substantiated, non-speculative allegations of material, pre-existing bias or misconduct, we need not permit convicted defendants "to waste the time of a district judge or inconvenience jurors merely to conduct a fishing expedition." United States v. Moten, 582 F.2d 654, 667 (2d Cir. 1978); see also Moses, 15 F.3d at 778 (holding that a convicted defendant is not entitled to a posttrial hearing on the issue of juror misconduct based on a vague and

uncertain affidavit of a juror that "never explains the basis of his suspicion"). I disagree with the court's conclusions that Tucker's allegations provide reasonable grounds for a post-trial hearing into the allegations of concealed juror bias and that Tucker's allegation of improper communications warrants any more searching a hearing than that conducted. Most important, however, I believe that the district court acted within its discretion.

A. Juror Bias

In support of his theory of concealed juror bias, Tucker relies upon the fact that, during his trial, Johnson married Charles Hayes, a former prisoner who had been denied executive clemency by Tucker. Tucker also alleges that Hayes is the nephew of a local activist, Say McIntosh, who frequently spoke out against Tucker before and during the criminal trial. Tucker argues that Johnson improperly failed to reveal these relationships during voir dire questioning, preventing him from discovering her alleged bias.

On a written jury questionnaire, which she answered prior to her courthouse marriage, Johnson indicated that she was single (as opposed to married, divorced, widowed or separated as set forth in the inquiry) and responded "n/a" (not applicable) to family information inquiries concerning a spouse.[14] Johnson was also asked, "Have you or any member of

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[14] These answers respond to the court's concerns, ante at 20, that Tucker's counsel was not permitted to question Johnson at the post-trial hearing on whether she considered herself a "part of a family with Hayes" at the time of voir dire. Obviously she did not because she considered herself single. She did respond that she had a child of "3 months." If her relationships were actually unknown to him or as important as he now contends, nothing prohibited Tucker from making further inquiry at voir dire as to the identity of the father of Johnson's child and her association with him. Tucker failed to do so.

your family ever been charged with a crime?" She answered, yes. Next, the questionnaire stated, "If yes, what was the charge?" Johnson answered, "Drug [c]onviction." The questionnaire then asked, "How did the case end?" Johnson answered, "guilty (serving 4 years)." Tucker contends that Johnson's affirmative answer referred to her brother-in-law and his drug conviction and not to Charles Hayes. This is probably a correct contention because Johnson's sister was, at the time of trial, married to Hayes's brother, Brian, who was apparently then serving a four-year sentence on a drug conviction. Charles Hayes, on the other hand, had been released from prison in April of 1993, which, according to the record, occurred prior to commencement of the Johnson/Charles Hayes relationship. In any event, Tucker asked no further questions about this answer during the voir dire examination.

Johnson's answers to the questions posed were honest, complete, and correct because "family" does not include one's fiancé. See United States v. Rushing, No. 933745, 1994 WL 131757 (8th Cir. Apr. 15, 1994) (holding that "family" does not include a girlfriend's son). The court mistakenly breathes new life into this relatively narrow question. As the record reveals, Johnson and Charles Hayes were merely engaged and had not even set a wedding date at the time of voir dire. We have previously rejected similarly broad post-trial interpretations of voir dire questions. See id.; United States v. Wright, 119 F.3d 630, 636 (8th Cir. 1997); United States v. Williams, 77 F.3d 1098, 1100-01, cert. denied, 117 S. Ct. 392 (1996); Bolin v. Black, 875 F.2d 1343, 1350 (8th Cir. 1989). Here, Johnson did not deliberately conceal any bias or even answer incorrectly--she merely answered the questions posed. Consequently, the district court reasonably concluded that no further inquiry into the questionnaire was warranted.

Furthermore, Tucker waived any bias claim based on Johnson's questionnaire answer. If Johnson had interpreted "family" to include her fiancé, her answer would have been substantially similar to that given. Thus, if Tucker was really interested in the subject, he had an obligation to ask more probing questions during voir dire about her family member's drug conviction. See United States v. Humphreys, 982 F.2d

254, 261 (8th Cir. 1992) (holding that a defendant may waive post-trial claim of juror bias if the defendant does not "diligently and timely discover the relevant information"). Tucker failed to do so, possibly in a gamble that Johnson would be more sympathetic to the defense. The court posits that the alleged inaccuracy in Johnson's answer to the question precludes a waiver analysis. See ante at 23. However, as earlier noted, Johnson's "family" member with a drug conviction was Charles Hayes's brother, who was, at the time of voir dire, married to Johnson's sister and in prison. Therefore, if Tucker had pursued the issue, as he should have, he would have at least discovered Johnson's general association with the Hayes family, regardless of the allegedly inaccurate questionnaire answer. His failure to do so waived the concealed juror bias claim.

The court also finds that Johnson's failure to respond to general questions regarding any potential sources of bias entitles Tucker to a post-trial hearing. However, Tucker failed to support his motion for a new trial with anything remotely approaching what is required--substantiated, non-speculative allegations of material, pre-existing bias on the part of Johnson. See Moses, 15 F.3d at 778; Moten, 582 F.2d at 667. The test focuses on whether Tucker raised reasonable grounds demonstrating concealed bias on the part of Johnson, not on the part of her husband or members of her husband's extended family. Considering the speculative and vague nature of the allegations that Tucker offered, the district court properly refused to conduct a post-trial hearing into those allegations.

The serious mistake the court makes in this regard is its apparent acceptance of Tucker's claim that Hayes was a part of Johnson's family at the time of the questionnaire and voir dire. This allegation, of course, does not accurately depict their relationship. Hayes was not a member of her family at the time of voir dire and was correctly not considered a family member by Johnson. Her answers were therefore fully responsive, correct, and truthful, and they serve to establish no pre-existing bias whatsoever.

Even if we were to accept the rationale that Johnson

did, or should have, considered Charles Hayes a part of her family, a proposition supported only by speculation, inference, and an overreaching search for a definition of the term "family," Tucker has advanced no support for his allegation that Johnson was biased. See McDonough, 464 U.S. at 556; id. (Blackmun, J., concurring) (stating that the "proper inquiry" is on the juror's impartiality); id. at 557-58 (Brennan, J., concurring) (stating that a litigant should be required to show that the juror was biased). Tucker has only raised support for the allegation that Johnson's husband and extended family harbored a bias against Tucker, which is, of course, irrelevant to the issue of Johnson's partiality.

In spite of Tucker's failure to come forth with evidence of Johnson's alleged bias, the court validates a fishing expedition that allows Tucker to attempt to develop the kind of facts necessary to permit a post-trial inquiry in the first instance. The court commands this exploratory expedition in the face of statements under oath by Johnson, credited by the district court, that she knew nothing of Charles Hayes's or Say McIntosh's state of mind toward Tucker. As indicated, Tucker has offered absolutely nothing that refutes Johnson's testimony, but now wishes to attack her court-accepted credibility in an effort to overcome the factual shortcomings inherent in his assault on her purported state of mind. This approach is clearly contrary to McDonough, Moten, Humphreys, and numerous other cases from this circuit. Indeed, the court does not cite a single case in support of this result and I have found none.

B. Improper Communications Allegation

We also review for an abuse of discretion the scope of a post-trial hearing into an allegation of improper communication with a juror. See Caldwell, 83 F.3d at 957; Moten, 582 F.2d at 665-66. Here, considering the vague allegations made by Tucker, I would find that the district court clearly acted within its discretion. Remanding this matter will only result in another unnecessary fishing expedition and the improper harassment of Johnson.

The court makes two significant errors in its analysis: first, that Tucker's allegation of improper communications is "supported by evidentiary materials with significant indicia of reliability;" and second, that the post-trial hearing consisted merely of "asking the juror whether [she] committed the misconduct." Ante at 29.

The hearsay-riddled, conclusory affidavit of an Arkansas State Senator stating that he was told by Tommy McIntosh that Tommy had talked to Charles Hayes and that Charles had told Tommy that Charles had talked about the trial with his wife during the trial is not evidence with any "significant indicia of reliability" that is relevant to any proper inquiry in this case. The affidavit merely states that Hayes talked about the trial "with his wife during the trial," and it falls short of even speculating about the substance of the conversations between Hayes and Johnson. This is fatal to Tucker's claim. The court again overemphasizes the purported animosity that Charles Hayes and his extended family have exhibited toward Tucker without giving due consideration to whether Tucker offered any substantiated, non-speculative allegations of material improper communications.

"Erring on the side of caution," the district court held a post-trial hearing to investigate the matter further. Tr. of Hr'g at 3. Tucker had the opportunity to examine all twelve jurors, each of whom testified that no extraneous information entered the jury room. Tucker also questioned Johnson about whether she discussed the trial with her husband while empaneled. Johnson testified and emphatically denied that she improperly discussed the trial with her husband. She also testified that she had no knowledge of the activities of her husband's uncle. The district court obviously credited Johnson's testimony and under controlling law this court has no authority to hold that finding of fact to be erroneous.

Given this evidence, the court engages in speculation and conjecture of its own on its way to its erroneous conclusion. The court states that "[c]ontamination of a different kind [other than exposure of a juror to an extraneous fact] occurs when, rather than being exposed to a fact not in

evidence, a juror is subjected to psychological pressure by an outsider trying to coopt that juror's vote." Ante at 28. Of course, there is no evidence that such pressure existed. Indeed, the evidence given under oath by Johnson is flatly to the contrary. She specifically testified in response to Tucker's questions that she only knew of Say McIntosh, and that she knew of no communication by Say McIntosh to anyone during the trial. Tr. of Hr'g at 12. She also testified that although she knew her husband had been in prison, she knew nothing of the clemency matter which appears to have occurred well before they became closely acquainted and before this court granted habeas relief, releasing Charles Hayes from prison in 1993. See id. at 10, 11 and 12; Hayes v. Lockhart, No. 92-2979, 1993 WL 91269 (8th Cir. Mar. 31, 1993). The court simply elevates Tucker's speculative, unsupported allegations to the status of fact in erroneously arriving at its decision to remand this matter for further hearing.

Tucker has failed to identify the nature of the extraneous information that he suggests was communicated to Johnson, but now claims that the district court erred in precluding him from examining her husband, her husband's cousin, and the state senator who spoke to her husband's cousin about the trial. Such a far-reaching hearing is not warranted in the absence of substantiated, non-speculative allegations of material juror misconduct. See Caldwell, 83 F.3d at 957. Tucker had his chance to present such allegations at the post-trial hearing and on his proffer of evidence before this court, but presented only allegations "based on speculation and conjecture." Tr. of Hr'g at 3. Accordingly, I disagree with the court's decision to remand this case to conduct a more expansive hearing into the allegation of improper communications.

Because I do not believe federal law or the Constitution requires the district courts to waste scarce judicial resources by guiding post-trial fishing expeditions into naked allegations of juror bias or misconduct, I dissent from Part I.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Appendix B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF

vs. CASE NO. **LR-CR-95-173(2)**

JIM GUY TUCKER DEFENDANT

MEMORANDUM OPINION AND ORDER

Pending before the Court is defendant Jim Guy Tucker's (Tucker) motion for a new trial. Tucker, the Governor of Arkansas until his conviction, was indicted on eleven counts in a twenty-one count indictment. He was convicted on May 28, 1996, of conspiracy involving the misuse of the funds of Madison Guaranty Savings and Loan, and Capital Management Services, a small business investment company. He was also convicted of mail fraud in connection with a loan from Capital Management Services to Castle Sewer and Water Corporation.

On July 12, 1996, Tucker filed a supplement to his motion for new trial, alleging that he recently learned certain information regarding juror Renee Johnson. In particular, he alleged that Johnson failed to disclose her relationship to Charles Hayes, a convicted felon who was denied clemency by Tucker and is a nephew of Robert "Say" McIntosh, a bitter critic of Tucker.

The Court denied the motion for new trial. The Eighth Circuit Court of Appeals remanded the case in United States v. Tucker, 137 F.3d 1016 (8th Cir. 1998). Pursuant to the Eighth Circuit's order, the Court conducted a hearing on Tucker's claims on December 2, 3, and 7, 1998. The parties submitted post-hearing briefs, proposed findings of fact and conclusions of law, and replies. The issue before the Court is whether Tucker's Sixth Amendment right to an impartial jury was

violated because juror Renee Johnson (Johnson)[1] concealed her relationship to Hayes and the McIntosh family and because she was subjected to outside influence.

FACTUAL BACKGROUND

Prior to the voir dire, prospective jurors completed a jury questionnaire. Question 39 asked if "You or any member of your family have ever been charged with a crime." Johnson responded "Yes" to the question. When asked what charge, she responded "drug conviction." When asked "[h]ow did the case end?", Johnson stated "Guilty (serving 4 years)." During voir dire, Johnson was not questioned about her response to question 39.

Johnson did not identify the person mentioned in question 39. She stated at the hearing that the response to question 39 referred to Brian Hayes, her sister's husband (and thus, Johnson's brother-in-law).

At the time Johnson completed her questionnaire, she was not married to Charles Hayes, Brian Hayes' brother, although they were engaged, living together with their child, and contemplating marriage.

Johnson married Charles Hayes (Hayes) after she was selected as a juror and during the fourth day of the trial on March 14, 1996. Hayes is the nephew of Robert "Say" McIntosh. Say McIntosh is a political activist, known throughout the Central Arkansas area for his outspoken criticism of political figures.[2] His criticism is not limited to a

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[1]Johnson was married during the trial (see discussion infra) and is now Renee Hayes. To be consistent with the Eighth Circuit's opinion and with the parties' submissions, as well as to avoid any confusion, the Court will refer to her as Johnson.

[2]McIntosh's political activism has been the subject of litigation. See McIntosh v. White. 582 F. Supp. 1244 (E. D. Ark. Mar 19, 1984), affd in part, rev'd in part, 766 F.2d 337, on appeal after remand, 816 F.2d 409, judgment vacated, 825 F.2d 184, on remand, 676 F. Supp. 912, aff'd, 856 F.2d 1185 (8`h

particular party; he is known to protest the actions of both Republicans and Democrats. He is known for distributing fliers which can be characterized as inflammatory and derogatory.

While Tucker was Governor, Say McIntosh was openly critical of him. He distributed a number of leaflets expressing his opinion of Tucker, including his belief that Tucker was guilty of the charges pending in this matter. In addition, he constructed a "mock cemetery" in the central Little Rock area which displayed signs critical of Tucker and President Clinton.

Hayes is also the cousin of Tommy McIntosh, the son of Say. Hayes, Tommy McIntosh and Maurice Crawford (a cousin of Hayes and Tommy McIntosh) were convicted in 1989 on drug charges in state court. Hayes and Crawford each were sentenced to 40 years in prison and a $50,000.00 fine. Tommy McIntosh was sentenced to 50 years in prison and a $250,000.00 fine.

William Walker (Walker), a member of the Arkansas legislature, first as a representative and then as a senator, was a friend of all three men, that is Tommy McIntosh, Hayes, and Maurice Crawford (Crawford). Sometime in 1992, when Tucker was Acting Governor, Walker attempted to persuade Tucker to exercise executive clemency in favor of the three men. He met several times with Tucker to argue the case of the three men. Walker believed the sentences to be excessive and politically motivated, based on Say McIntosh's activism. Walker told the three men and their families of his efforts with Tucker. In July, 1992, Tucker denied Hayes' clemency petition and sent a letter to Hayes conveying that information. Walker claimed that Hayes was upset upon hearing the news from him.

In January of 1993, Tucker, who then was Governor, left the state to attend the presidential inauguration. While out of state, Senator Jerry Jewell (Jewell) served as [illegible]. Walker approached Jewell about granting clemency to Tommy McIntosh, Hayes, and Crawford. Jewell granted McIntosh clemency on January 19, 1993, but refused Hayes' and Crawford's request because

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Cir. 1988). See also, McIntosh v. Arkansas, 1998 WL 171088 (Ark. Ct. of Appeals, Apr. 8, 1998).

the files were not in the office.[3] Walker stated that sometime after McIntosh's clemency, he went to see Hayes and Crawford and explained that the applications had not been acted upon because Tucker's chief of staff had not made the files available. Walker stated that Hayes was frustrated and angry upon learning of the denial, and thought that his not getting clemency was unfair.

At the time Hayes was applying for clemency, he also had a petition for writ of habeas corpus pending in federal court. Hayes ultimately prevailed on his petition for writ of habeas corpus. On March 31, 1993, the Eighth Circuit Court of Appeals affirmed the granting of the writ. Hayes v. Lockhart, 989 F.2d 505 (8th Cir. 1993) (unpublished). The State did not retry Hayes and he was released pursuant to the granting of the writ.

Tommy McIntosh is also an outspoken critic of Tucker. Prior to Tucker's trial, Tommy and his father, Say, picketed Tucker's office demanding a pardon of his $250,000.00 fine. Tommy McIntosh admitted to disliking Tucker. He claims to have discussed his negative feelings toward Tucker with Hayes, including his wish that Tucker be convicted.

At some point during the trial, Tommy McIntosh called Walker late one night and exclaimed "We've got somebody on the jury."[4] Walker stated that he didn't know what Tommy meant, to whom Tommy was referring and did not take Tommy seriously. According to Walker, Tommy McIntosh boasts and says some things that are not true, so Walker did not read a whole lot into what Tommy McIntosh said that night.

In July, 1996, after learning of Johnson's connection to

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[3] Ned Turner, Tucker's Chief of Staff, called Tucker in Washington and informed him that Jewell was preparing to grant clemencies including a clemency to Tommy McIntosh. Tucker instructed his staff to not make any more files available to Jewell.

[4] Walker stated that McIntosh called him late one night during the trial. Tommy McIntosh was not as certain that he made the call. He stated that he "might have mentioned that" to Walker. (See infra).

the McIntosh family, Tucker called Walker to inquire about Johnson. Tucker asked Walker if he knew that Johnson was the wife of Hayes. During that conversation with Tucker, Walker said "That's what Tommy was talking about" and Walker recounted the telephone call he received from Tommy McIntosh.

Walker then met with Hayes to confirm that Hayes' wife had been on the jury. Walker testified that he spoke with Hayes after the trial about Johnson's jury service. Walker stated that he asked Hayes whether he had had any conversations with Johnson about the trial, to which Hayes responded, "Sure, that's my wife. We sleep together every night. We talked about it." Walker did not recall whether Hayes stated that he had spoken to Johnson about the trial during the trial. Hayes did not tell Walker what they discussed about the trial.

Hayes denied making the statement Walker attributed to him. However, even assuming that Hayes did make that comment, there is no evidence regarding the details of any conversations between Hayes and Johnson. Walker acknowledged that Hayes did not tell Walker that he and Johnson discussed the trial or the guilt or innocence of Tucker. Nor did Hayes tell Walker that he had said anything to Johnson during the trial pertaining to the trial or to Tucker. Walker admitted that he did not know what Hayes meant when he made that statement.

Tommy McIntosh testified at the hearing. He stated that he visited Hayes on only two or three occasions during the trial. The two stayed outside and talked. Tommy McIntosh stated that he found out that Johnson was on the jury during the trial, although he was not sure from whom he learned the information.[5]

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[5] Johnson's presence on the jury was a matter of public record. A March 12, 1996 article in the Arkansas Democrat-Gazette about the jurors contained the following: "The three youngest jurors--Renee Johnson, 27; Doris Jackson, 31; and Tracy Pleasants, 30--are black women, also a traditionally Democratic group." (See Newswatch, Service of the U. S. Court of Appeals Library for the Eighth Circuit, March 25, 1996, p. 8).

Tommy McIntosh stated he did not remember asking Hayes if he and Johnson talked during the trial. He also denied telling Walker that Hayes had talked to Johnson during the trial, and could not say for certain that he had told Walker "We got somebody on the jury." Even if he did make such a statement, Tommy McIntosh admitted that the comment was made as "boasting." Walker did not ask him to whom McIntosh referred. McIntosh stated that his conversations with Hayes about Johnson being on the jury were brief and that he did not do anything to try to get Hayes to influence Johnson. Tommy McIntosh also stated that Hayes never expressed anger at or said anything negative about Tucker during the trial. McIntosh and Hayes concur that Hayes never told Tommy McIntosh that he had talked to Johnson during the course of the trial. Furthermore, Tommy McIntosh never talked to Johnson about the trial.

Hayes testified at the hearing that he and Johnson did not really discuss his conviction. He had felt he was wrongfully convicted and wanted to put the matter behind him. He was not aware of Tucker's role in denying the clemency petition.[6] He stated that he could not recall which official denied him clemency, then Acting Governor Tucker or then Governor Bill Clinton. He had not put much stock in his clemency petition. Rather, he put more weight on the habeas petition which was pending in federal court, and on which there had been in a hearing in 1992.[7]

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[6] Hayes first applied for clemency in June, 1991, when President Clinton was then Governor of Arkansas. Tucker denied the application in July, 1992, when he was Acting Governor.

[7] Hayes admitted to feeling confused when he learned of Tommy McIntosh's release. He, at one point, stated that he thought his release had already been granted, and that he should have been released before McIntosh (p. 597, Transcript of December 7, 1998 hearing). His confusion is understandable. A review of the Court's docket sheet of Hayes' habeas proceeding (LR-C-90751) reveals that on August 7, 1992, Magistrate Judge Jerry W. Cavaneau granted the petition for

Hayes admitted that he spoke with Say McIntosh about Johnson being on the jury. Hayes was not sure whether the discussion took place during the trial or after. Hayes also admitted telling Tommy McIntosh that Johnson was on the jury at the time of the trial. He did not recall Tommy McIntosh asking him if Hayes had spoken to Johnson about the trial during the trial.

Hayes stated that he met with Walker. He stated that he did not tell Walker that he talked to Johnson about the trial while she was on the jury.

Walker, who had petitioned on Hayes' behalf, informed Hayes that Jewell did not act on the petition because his file had not been given to Jewell. Hayes testified that he did not have any personal animosity toward whomever denied him clemency, recognizing that executive clemency was extremely rare. Even assuming some hostility or disappointment on his part, Hayes did not convey his feelings to Johnson. In fact, Johnson was not even aware that Hayes had ever applied for executive clemency, and therefore had no knowledge of Tucker's role in the denial.

Johnson stated that she became personally involved with Hayes after his release from prison. She "knew of him" before then, having met him once when she visited Brian Hayes in prison. She and Hayes lived together for at least one year before their daughter Taylor was born. She and Hayes purchased the home on Tyler Street in November, 1995, shortly before Taylor's birth.

When Johnson first started dating Hayes, she was aware of the fact that he had been in prison. Hayes did not talk to her about prison and did not express any bitterness about time he spent in prison. She, like Hayes, believed that the conviction

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writ of habeas corpus, and directed the State to retry Hayes or the writ of habeas corpus would issue. The State appealed the judgment on August 31, 1992. The Eighth Circuit issued its Order affirming the judgment on March 31, 1993. This sequence of events also supports Hayes' position that he placed more weight on the habeas proceeding; he had already prevailed at the District Court level by the time McIntosh was granted clemency.

and imprisonment were "something they wanted to put behind" them. She was not familiar with the circumstances of how Hayes gained release or of Tucker's role in denying the clemency petition..

Johnson stated that she did not discuss the trial or Tucker with Hayes during the trial. While a juror, Johnson drove to the courthouse herself. She did not have lunch with Hayes except the day they were married. Every other day she had lunch with the jurors.

She also claimed that she did not have any conversations with Tommy McIntosh, or Bill Walker about the trial during the trial. Johnson testified that she knew the McIntosh family, and knew that Say was well known as a political activist. She was not, however, aware that Say did not like Tucker, although she was familiar with Say's leaflets. She admitted to not reading the newspaper regularly and to watching the news only occasionally.

ANALYSIS

As discussed by the Eighth Circuit, Tucker presents two discrete legal theories in his motion for new trial. Each is discussed below.

Juror Bias

To obtain a new trial based on juror bias, Tucker has to prove "three things about the voir dire: 1) that Juror Johnson answered dishonestly, not just inaccurately; 2) that she was motivated by partiality; and 3) that the true facts, if known, would have supported striking her for cause." 137 F.3 d at 1026. See also United States v. William~, 77 F.3d 1098, 1100 (8`" Cir. 1996), denied, 117 S .Ct. 392 (1996) ("Under McDonough. the party challenging the juror's qualifications must show that the juror failed to honestly answer a material question on voir dire and that a correct response would have provided a valid basis for a challenge for cause. ")[8]

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[8] Tucker argues that he need not demonstrate dishonesty but that it is merely a factor to be considered by the Court in

The government argues that the inquiry is limited to whether Johnson answered dishonestly in her response to question number 39 on her juror questionnaire. The Court disagrees. The Eighth Circuit was concerned with Johnson's responses during voir dire, including her failure to respond to the Court's and counsel's broad inquiry into possible bias or partiality.[9]

Tucker argues that Johnson should have disclosed her relationship with Hayes. The questionnaire did not ask about anyone other than relatives. None of the attorneys asked during voir dire about fiances. Johnson was not married to Hayes at the time of voir dire.

Even her plans for marriage were not definite. The evidence reveals that sometime in January, 1996, she spoke with the manager of the Hotze House, Peggy Tooker, about booking a wedding reception there for March 9th. Tooker stated that Johnson did not make the required deposit to reserve

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determining whether Johnson was biased. See McDonough, 464 U.S. at 558 (Brennan, J. concurring). It would appear that Tucker is precluded from arguing that he does not have to meet the "dishonesty" threshold under the law of the case doctrine. See Bethea v. Levi Strauss and Co. 916 F.2d 453, 456 (8th Cir. 1990) ("When an appellate court remands a case to the district court for further proceedings consistent with the appellate decision, all issues the appellate court decides become the law of the case.") Here, the Eighth Circuit specifically found that Tucker must demonstrate dishonesty, noting that Tucker had not asked the appellate court to decide whether he could receive a new trial without a showing of dishonesty. 137 F.3d at 1026 n. 7.

However, in an abundance of caution, the Court has considered Tucker's other claims pertaining to bias and as is discussed infra finds that they are without merit.

[9] The Court and prosecutor asked whether there was anything that would affect the juror's ability to serve fairly and impartially in the case. Counsel for Tucker specifically asked whether the jurors harbored any negative feelings about Tucker.

that date. At some later date, Johnson booked a March 29 reception which was held.

The Court notes that Johnson did not attempt to conceal her marriage. She had a reception at which around forty people attended. The reception took place during the trial, when Johnson's presence as a juror had been made public in the press. Furthermore, that neither Say nor Tommy McIntosh were at the reception or even knew of the marriage reflects that Johnson did not have a close or ongoing relationship with either.

Tucker argues that Johnson and Hayes lived together as a "family" at least a year before their daughter Taylor was conceived. They purchased a home together in Little Rock in November, 1995, before Taylor's birth on November 18, 1995. Nevertheless, Johnson did not believe that living as a 'family' constituted a family. As Johnson stated, it takes a marriage to make a family.[10] Johnson testified credibly, in the Court's opinion, that Question 39 concerned only family members and that Charles Hayes did not fall into that category because they were not married.

The Court cannot find, based on the evidence at the hearing, that Johnson was dishonest or attempted to conceal Hayes' conviction or her relationship to him. She responded truthfully to the question. See United States v. Wright, 119 F.3d 630, 636 (8th Cir. 1997) (juror did not answer dishonestly to question asking jurors whether they were related to "law enforcement officer" where he could have honestly believed that a tribal children's court judge was not a law enforcement officer). See also Bolin v. Black, 875 F.2d 1343, 1350 (8th Cir. 1989), cert. denied, 493 U.S. 993 (1989) (juror's failure to disclose that her son was on probation in response to voir dire

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[10] Tucker asserts that even if Johnson's answer was "technically correct," she had some obligation to reveal her marriage during the trial to the parties. While Tucker asserts that due process entitles a party to notice of a juror's change in marital status during a trial, he has not pointed to any decision finding a constitutional violation where a juror did not reveal a change in marital status or which places such a requirement on a juror.

question as to whether jurors' family members presently incarcerated not juror misconduct). Here, Johnson stated that she would have revealed the information about Hayes if she had been asked.

Consistent with Johnson's belief that she did not have to reveal information about Hayes, Johnson did not include any information about him in the questionnaire calling for family information. She responded "N.A." to questions about spouse although she was engaged at that time to Hayes. Questions about the family immediately preceded question 39.

The Court also finds that Johnson was not being dishonest or intentionally deceiving the litigants or the Court when she did not respond to the Court's requests that the jurors disclose anything that could have any bearing on their partiality. That Johnson disclosed the drug sentence of Brian Hayes, also of the McIntosh family, also is supportive of the government's position that Johnson did not intentionally deceive or hide anything. Although the Eighth Circuit found that Tucker did not have to ask any more questions, an inquiry as to the name of the family member by Tucker might have revealed Johnson's association with the McIntosh family.

Furthermore, the Court cannot find that Johnson was biased against Tucker. There is no evidence that she paid any attention to Say McIntosh's fliers or criticism of Tucker or that she was in any way influenced by his opinions.[11] There is no evidence that she harbored negative feelings toward Tucker.

Tucker argues that there is evidence that Hayes harbored some negative feelings toward Tucker, particularly with regard to the denial of clemency. Hayes denies this. However, even assuming Hayes had negative feelings toward Tucker, there is no evidence that he conveyed those feelings to Johnson. Indeed, the evidence is that Hayes never discussed his attempts at clemency, and that he and Johnson never even

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[11]She stated that she did not read the flyers on the wall of Say's restaurant. When asked if she didn't take time to read them, she stated "No, I could care either way." Later she said she "didn't keep up with that stuff. [i.e., Say's activities]. It didn't concern me. I don't care either way." (Transcript of hearing, Dec. 3, 1998, p. 108.)

discussed Tucker during the trial.

The Court finds Hayes' testimony credible. He is extremely soft-spoken, and in the Court's opinion, genuinely desirous of putting his conviction and incarceration behind him. He stated that he spoke to Johnson about his conviction no more than twice. It "wasn't nothing that I wanted to just dwell on." (Transcript of hearing, Dec. 4, 1998, p. 481). He did not discuss the denial of clemency with Johnson, as it was not something on which he had placed a great deal of hope. In addition, the clemency application had been denied in 1992, before Hayes met Johnson and about two years before they started living together. Hayes realistically believed that the chances of obtaining clemency were minimal.

Emma Roland, Hayes' mother, supports Hayes' assertions. She stated that Hayes never expressed anger at Tucker about not being released and did not indicate in any way that Tucker was responsible for Hayes remaining incarcerated. Roland also stated that Hayes never mentioned anything about the trial to her.[12]

Additionally, the Court must reject Tucker's argument that Johnson's silence or failure to disclose her connection to

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[12] Walker's assertions that Hayes was upset and angry about his sentence as well as with Tucker are somewhat suspect. Walker claims to have visited Hayes frequently while the latter was incarcerated. Yet he did not recall hearing anything about the results of the habeas corpus petition. Furthermore, despite being good friends with Hayes, Walker did not know of Hayes' marriage to Johnson, had not been invited to the wedding reception, and did not even know Johnson.

In addition , the Court notes that Walker cannot be considered a completely disinterested witness. At the hearing Walker admitted to having business dealings with Tucker, particularly regarding Tucker's cable television business and Castle Sewer and Water. Walker was, in fact, questioned by the FBI and the Office of Independent Counsel, in February, 1996, about the possibility of being a potential witness concerning the legislation involving Castle Sewer and Water. Furthermore, Walker and Tucker have been political allies over the years.

the McIntosh family is indicative of some sort of implied bias. The Court cannot imply or presume a juror's bias. See Smith v. Phillips, 455 U. S. 209, 215-217 (1982) (rejecting claims of implied bias; must prove actual bias); Goeders v. Hundley, 59 F.3d 73, 75 (8th Cir. 1995) (Phillips requires a showing of actual bias). See also Johnson v. Armontrout, 961 F.2d 748, 752-53 (8t' Cir. 1992). As discussed above, Tucker has failed to show actual bias on the part of Johnson.

Tucker's counsel scrupulously examined Johnson. The Court had the opportunity to observe her demeanor and consider her responses. While some of Johnson's responses may seem incredible to Tucker, the Court cannot find them so. Johnson is a quiet, reserved individual. It is clear, judging from her demeanor, that she is a private person. She responded to questions literally. She "knew of Hayes" but did not know him, in the sense of being friends or having conversations, until after he was released from prison. Her distinction is rational, not farfetched. Furthermore, the Court cannot find that her interpretation was meant to deceive the Court or the parties, or that she in any way intentionally withheld the truth. She just did not feel that her relationship to Hayes and the McIntosh family was important, or that it had any bearing on her ability to be fair and impartial. She stated credibly that when she was asked general questions about her ability to be fair and impartial she did not raise her hand because she thought she was being truthful.

Tucker finds it incredible that Johnson denied knowledge of the drug convictions of Hayes, McIntosh, or Crawford, although she had married one and dated the other two. She denied knowledge of Tommy McIntosh's highly publicized release from prison. She did not know how Hayes was released from prison, that is, as a result of the granting of a habeas corpus petition. Tucker notes that Johnson is intelligent, and completed two and a half years of college. She has a banking degree from a business college. She described herself in her juror questionnaire as "occasionally involved in politics" and well informed on local news events.

The Court, again after viewing Johnson's demeanor and considering her testimony, finds that Johnson is not politically involved and pays little attention to politics. According to Hayes, she did not keep up with the news. She is not interested

in the beliefs of Say McIntosh and pays little attention to his public activities. As she stated at the hearing, Say's activities didn't interest her.

In sum, the Court finds that Tucker has failed to establish that Hayes concealed her relationship to Hayes and the McIntosh family.

Improper Communication

Tucker also contends that Johnson was subjected to outside influence during the trial. "To gain a new trial on the ground of juror misconduct, a movant must present evidence that is not barred by Federal Rules of Evidence 606(b) and that establishes grounds recognized as adequate to overturn a jury verdict." 137 F.3d at 1030. Federal Rule of Evidence 606(b) generally bars testimony regarding intra-jury communications. "The rule's two exceptions allow testimony regarding extraneous prejudicial information and outside influences brought to bear on the jury." United States v. Caldwell, 83 F.3d 954, 956 (8" Cir. 1996). "[E]xposure of the jury to improper communications or extrinsic material evidence creates a presumption of prejudice, and therefore a presumption of an infringement of the defendant's Sixth Amendment right to trial by an impartial jury." United States v. Melius, 123 F.3d 1134, 1139 (8th Cir. 1997), cert. denied, 118 S. Ct. 871 (1988) (citations omitted).

Tucker relies on Walker's assertions that Hayes stated that he discussed the trial with Johnson during the trial. Walker had made that statement in his affidavit which was submitted in support of the motion for new trial.[13] He admitted that the statement "during the trial" contained in the affidavit was put in as a result of additional questions by Tucker or his counsel during the drafting of the affidavit.

At the hearing, Walker could not recall whether Hayes said that the communications occurred during the trial.

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[13] Walker testified that he discussed the matter with Tucker's counsel before reducing it to writing. Walker stated that some of the information was added to the affidavit as a result of questioning by both Tucker and his counsel.

Furthermore, Walker admitted that he did not know the content of any conversations between Hayes and Johnson and Hayes did not tell Walker that he had said anything improper to his wife during the trial. Hayes and Johnson deny that they had any discussions about the trial during the trial- That such conversations took place would require the Court to engage in speculation and conjecture.

Johnson testified that she did not have any conversation or contact with Tommy or Say McIntosh during the trial.[14] She stated that no one ever attempted to discuss the trial with her. Her mother-in-law, Emma Roland, stated that she asked Johnson how the trial was going. Johnson would respond "alright" or something similar. As Roland noted, Johnson is not a talkative person.

That Say or Tommy McIntosh knew of Johnson's presence on the jury also is not probative of improper influence. As mentioned above, Johnson's participation as a juror was public knowledge. There is absolutely no evidence that anyone, particularly anyone associated with Say McIntosh, attempted to influence Johnson or discuss the trial with her.[15] Johnson testified credibly, in the Court's opinion, that she did not have any conversations with Hayes, or any McIntosh family member, about the trial during the trial. The Court is persuaded that Johnson heeded the Court's regular admonition not to discuss the case with anyone.

In sum, the Court finds that Tucker just has not met his burden of demonstrating that improper communications

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[14]"Tommy McIntosh came to the house on Tyler Street during the trial, but at the most he exchanged only pleasantries with Johnson. There is no evidence that they had a conversation about the trial.

[15] Say McIntosh attended the trial on several occasions. No one testified that they observed any improper contact between McIntosh and Johnson, or that McIntosh in any way attempted to "communicate" with Johnson while she was seated in the jury box. There is also no evidence that Johnson saw any of McIntosh's demonstrations or protests outside the courthouse during the trial.

occurred during trial, that Johnson received any extraneous communication from any source or that was subjected to improper influence. Thus, the Court finds that Tucker's Sixth Amendment right to an impartial jury was not violated.

Accordingly, the motion for new trial is denied.

IT IS SO ORDERED this 17th day of February, 1999.

/S/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

Appendix C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-1832

United States of America,

Plaintiff - Appellee,

v.

Jim Guy Tucker,

Defendant - Appellant.

* Appeal from the United States
* District Court for the Eastern
* District of Arkansas.

Submitted: September 13, 1999

Filed: February 27, 2001

Before MCMILLIAN, JOHN R. GIBSON, and BEAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Jim Guy Tucker appeals from an order of the district court[1] on remand from our earlier decision in United States v. Tucker, 137 F.3d 10 16 (8th Cir. 1998). In that case, we ordered an evidentiary hearing on allegations that juror Renee Johnson had concealed material information during voir dire and had engaged in improper communications during trial. The

[1]The Honorable George Howard, Jr., United States District Judge for the Western District of Arkansas.

district court held the required hearing and found that Johnson was not dishonest in her answers to voir dire questions concerning her familial relationships and possible bias against Tucker. United States v. Tucker, 36 F. Supp. 2d 1110, 1115 (E.D. Ark. 1999). On the improper communications issue, the court found that there was no evidence that Johnson was subjected to outside influence during trial. Id. at 1117-18. Accordingly, the district court denied Tucker's motion for a new trial. Tucker argues that the district court's findings are erroneous because Johnson's explanation of why she did not reveal her relationship with her soon-to-be husband contradicts her other testimony; because the district court believed bias could only be proved by the juror's admission; and because two witnesses testified that Johnson had talked to her husband about Tucker's case during the trial. While the facts of this case are unusual and of understandable concern to Tucker, we hold that the district court's findings are not clearly erroneous, and therefore we must affirm.

When this case was tried, Jim Guy Tucker was the governor of Arkansas. After he was convicted for conspiracy and mail fraud, Tucker learned that during the trial one of the jurors, Renee Johnson, had married Charles Hayes. Hayes is a former state prisoner whom Tucker had denied clemency, both directly and by blocking an acting governor's attempt to commute his sentence. Hayes is also the nephew of a political activist, Say McIntosh, who had attacked Tucker in leaflets and demonstrated against him outside the courthouse during trial. Tucker moved for a new trial based on his allegations that Johnson had concealed her relationship with Hayes at voir dire, that she had concealed bias against Tucker, and that she had engaged in improper discussions with Hayes during trial. Tucker, 137 F.3d at 1023. Tucker supported the factual allegations of his motion with an affidavit from William L. Walker, Jr., who said he had asked Tucker to grant Hayes clemency and who recounted the circumstances under which an acting governor's attempt to grant clemency was blocked. Walkers affidavit also stated that Hayes had expressed anger over the denial of clemency. Walker claimed to have knowledge from Hayes's cousin, Tommy McIntosh, that Hayes had discussed the trial with juror Johnson during the trial. Id.

at 1023-24. Tucker also filed his own affidavit describing his role in denying Hayes clemency. Id. at 1024.

In a jury questionnaire submitted about two weeks before voir dire, Johnson stated that she was single, that questions concerning a spouse were not applicable, and that she had a three-month old child. Id. at 1021. In response to a question asking whether "any member[s] of your family [have] ever been charged with a crime," "what . . . charge," and "how did the case end?" Johnson wrote, "Yes. Drug Conviction. Guilty (serving 4 years)." During the voir dire itself, held on March 4-7, 1996, Johnson stated that she had not formed an opinion regarding the guilt or innocence of any of the defendants. Id. at 1021-22. The judge repeatedly stressed the need for venire members to reveal possible sources of bias and gave the venire members multiple opportunities to disclose anything that could have any bearing on their partiality. Id. at 1022. When asked directly, Johnson said there was nothing that would affect her ability to serve fairly and impartially in the case. Id. Trial began on March 11, 1996, and on the fourth day of trial, Johnson married Charles Hayes over the lunch break. Id. at 1023 n.4, 1025.

The district court conducted a hearing on Tucker's new trial motion, but even though Tucker alleged both concealment of facts at voir dire and outside influence over a juror, the court announced that the scope of the hearing would be limited to the question of whether the jury had been exposed to extraneous evidence during deliberations. Id. at 1024. At the hearing, Johnson testified that she did not know at the time she served as a juror that her husband had ever applied for clemency and consequently she did not know that Tucker had denied him clemency. Id. at 1024. She testified that she had been engaged to marry Hayes since 1994 and that she had lived with him, but counsel was not permitted to ask for further details or to explore her knowledge about Say McIntosh. Id. at 1024-25. Johnson stated that she did not tell about her husband's conviction when she filled out her jury questionnaire. Id. at 1025. (Her answer to the question about family members charged with crimes referred to her sister's husband, who, it turns out, is also Charles Hayes's brother.) The court did not

allow Tucker to question Johnson about whether she considered herself part of a family with Hayes and her daughter at the time of the voir dire. See 137 F.3d at 1025. Tucker was not allowed to examine Hayes. Id. at 1027. The government called the other jurors and asked them whether there had been discussion of Hayes's clemency proceedings during the trial or deliberations. All answered no. Id. at 1025.

Although the scope of the hearing was narrowly circumscribed, Tucker made an extensive proffer. He offered to prove that he had denied Hayes's clemency request. On another occasion when Governor Tucker was out of the state, Acting Governor Jerry Jewell had tried to grant Hayes clemency, but Tucker's staff had frustrated Jewell's attempt by refusing access to Hayes's file. Id. at 1025. Hayes's cousin, Tommy McIntosh, was convicted in connection with the same crime as Hayes, and Jerry Jewell successfully commuted Tommy McIntosh's sentence. Tucker offered to prove that the Hayes-McIntosh family knew that his staff prevented Jewell from granting Hayes clemency and that Hayes had expressed anger over the denial of clemency. Tucker's proffer also detailed the anti-Tucker activities of Say McIntosh, Tommy McIntosh's father, including his distribution of fliers accusing Tucker of racism in denying clemency to a black prisoner and juxtaposing the prisoner's supposed innocence with Tucker's supposed guilt. Tucker offered to prove that McIntosh demonstrated in front of the courthouse during Tucker's trial. The court denied Tucker's new trial motion because the court was not persuaded that the jury had access to extraneous evidence during deliberations. Id. at 1026.

On appeal, we concluded that Tucker was entitled to a fuller hearing than he had received. Tucker's claim of concealed juror bias was based on McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984), which required him to prove three things about the voir dire: (1) that Johnson had answered voir dire questions dishonestly; (2) that she was motivated by partiality; and (3) that the true facts, if known, would have supported striking her for cause. Tucker alleged that Johnson deceived the court by not including information about Hayes when she answered the question about whether a

member of her family had been charged with a crime. He also alleged that Johnson had dishonestly concealed her relationship to an anti-Tucker activist and her marriage to someone who had a grudge against Tucker, even though the court repeatedly urged the venire members to come forward with such information. The district court foreclosed Tucker from presenting evidence on his McDonough allegations at the 1996 hearing and focused only on the allegations that extraneous evidence had come before the jury.

Despite the narrow parameters of the 1996 hearing, Tucker had adduced evidence raising substantial questions about whether Johnson had tried at voir dire to conceal her relation to Hayes.

> According to Tucker's proffer, Johnson lived with Hayes, had a child with him, and was only a few days away from marrying him at the time of voir dire. Whether a juror in such a position would either understand Hayes to be included in the term "family" or at least would understand that the questionnaire meant to ask about people with whom she shared such a close relationship, is, we believe, an issue that requires further detailed inquiry .

Id. at 1028. Tucker had also raised fact questions about whether Johnson harbored bias against Tucker that she should have revealed during voir dire. His proffer of evidence suggested Johnson might have known about her husband's clemency proceedings and have been prejudiced against Tucker because of his role in denying Hayes clemency.

We held that Tucker had "raised enough question about what Johnson knew at the time of voir dire to entitle him to a full hearing on [the McDonough] issue, including crucial credibility determinations." Id. at 1027. We remanded with instructions that Tucker be allowed to adduce evidence relevant to the key questions of whether Johnson concealed her relation with Hayes and the story of his clemency petition; whether Johnson concealed these circumstances out of partiality; and

whether there were grounds to strike Johnson for cause. Id. at 1029.

We also held that Tucker's allegations of improper communications between Hayes and Johnson during the trial suggested the sort of "private communication, contact, or tampering," which gave rise to a presumption of prejudice in Remmer v. United States, 347 U.S. 227 (1954). 137 F.3d at 1030. Tucker had presented the affidavit of William Walker saying that Walker had knowledge that Hayes and Johnson had talked about the case. We said:

> The allegations of ex parte contact must be viewed in light of the extraordinary saga of Hayes's attempts to gain clemency; Tucker's frustration of those attempts directly and then by hiding Hayes's file from Jewell; and the McIntosh family's campaign against Tucker. With these facts in the background, the assertion that Johnson and Hayes had discussed the case during the trial must be taken as an allegation of serious misconduct, with a significant potential for prejudice to Tucker.

Id. at 1031. Such allegations entitled Tucker to a hearing to determine whether outside influence affected Johnson's ability to serve impartially on Tucker's Jury. Id. at 1033. However, the court had limited the scope of the 1996 hearing to investigation of whether the jury as a whole had been exposed to extraneous evidence, which was not the nature of Tucker's contention. Therefore, we remanded for the district court to conduct a hearing that would address Tucker's actual claim, probing whether Hayes and Johnson had talked about the case, what was said, and what effect such communications had on Johnson. Id. at 1033.

On remand, the district court conducted a three-day hearing in which Renee Johnson Hayes, Charles Hayes, William Walker, Tommy McIntosh, Tucker and others testified.

Johnson testified that she became involved with Hayes about six months or a year after he was released from prison, that she had lived with him about a year and a half before January 1996, and that at the time of voir dire she lived with him and their daughter "as a family." By February 1996, she said, they were contemplating getting married. She had bought a wedding ring and had looked into reserving a bed and breakfast for a wedding or wedding reception. She said that the reason she did not identify Hayes as a family member on her juror questionnaire was that she was not married to Hayes when she filled it out (in February 1996) and she did not believe the questionnaire asked anything that called for her to identify him. She later agreed with Tucker's lawyer that she and Hayes "bought a house as a family," "lived in it as a family," "paid utility bills as a family," and "paid the mortgage as a family." However, she also answered yes to the special prosecutor's leading question asking whether it took a marriage to make a family, and she agreed with another leading question that this was why she had not identified Hayes on the questionnaire.

Johnson said she had "known of Hayes all her life, but she had not become personally involved with him, in the sense of being engaged, until 1993 or 1994. She said she had known of him when he was in jail, because his brother was married to her sister at the time. However, Johnson denied that she ever talked to Hayes about the circumstances surrounding his attempts to get out of prison.

Johnson said that Tommy McIntosh had visited Hayes at their house once or twice in the six months before the Tucker trial. McIntosh would visit with Hayes outside the house while she was inside. Johnson's only contact with Tommy McIntosh would have been to exchange pleasantries with him, and she explicitly denied that he ever expressed to her any hostility toward Tucker.

Johnson said that during the trial she did not discuss what went on in the courtroom with anyone and that no one tried to influence her thoughts about the trial.

Hayes also took the stand. He testified that before he

and Johnson were married on March 14, 1996, they had been engaged a year and a half. He said she had wanted to get married "several times before then," but that he was "holding out."

Hayes said he first learned from Tommy McIntosh before Tucker's trial that Hayes's file had been intentionally concealed from Jerry Jewell, but that he did not associate the incident in any way with Tucker. He said he was not even aware that it was Tucker who had denied his request for clemency. He said he had not placed much hope in the idea that he would receive clemency but instead had concentrated on getting relief from the federal court (which in fact granted his habeas corpus petition). Hayes said that he and Johnson "really didn't get into" discussing his conviction. Hayes said, to his knowledge, Johnson never broke her word as a juror not to discuss the trial. He also said he never told Tommy McIntosh or William Walker that he and Johnson had discussed the trial while it was going on.

Tommy McIntosh testified that he had dated Johnson a couple of times after he got out of jail and that she knew his father, Say McIntosh, at that time. He found out through family members that Johnson was on the Tucker jury. Tommy testified that he and Hayes talked about the Tucker case and that Tommy expressed his opinion to Hayes that Tucker was going to be convicted. However, Tommy said, he never talked to Johnson about the trial, nor did he do anything to encourage Hayes to influence her. Tommy said he did not know about Tucker's staff hiding files from Jewell until after Tucker was convicted. He did not recall that Hayes ever said he discussed the case with Johnson during trial, but Tommy believed they did discuss it because, "[I]t's obvious. People on juries talk to their husbands." Tommy characterized his relation to Hayes as "best buddies, best cousins" and said that they were "like brothers." He said he wanted Tucker to be convicted so Tucker would "see what it felt like to be convicted on something you think you didn't do." Tommy telephoned William Walker during the trial. Knowing that Walker was a Tucker ally, Tommy said something like, "Yeah, your boy going to jail. We got him. He's going to be convicted." He said he may have

bragged to Walker about Johnson being on the jury.

William Walker stated that after Jewell had failed in his attempt to commute Hayes's sentence, Walker contacted Hayes and explained to him that Hayes's file had not been made available so that Jewell could act on it. Walker said that Hayes's disappointment and anger were apparent. Walker testified that Tommy McIntosh called him late one night during trial and told him, "We've got somebody on the jury." Walker didn't know at the time what Tommy was talking about, but when he found out after the trial that Hayes's wife had been on the jury, he concluded that Tommy had been talking about Hayes's wife. He called Hayes, who confirmed that his wife was on the jury. Walker asked Hayes whether he and his wife had any conversation about the trial, and Hayes responded, "Sure, that's my wife. We sleep together every night." On cross examination about this conversation, Walker was unsure whether Hayes had said he talked to his wife about the trial during trial: "I don't know whether he said 'during the trial.' I think at that point, I think he may have, he may not have." Furthermore, though he thought Hayes said that he talked with Johnson about "the trial," he had not asked Hayes for any further detail about what was said. Walker admitted that he was a Tucker political ally, that he had done approximately $13,000 worth of consulting work for Tucker some twenty years before, and that he had received a political campaign contribution from him and from a company in which Tucker held an interest.

Tucker himself testified about the Hayes-McIntosh clemency proceedings and about Say McIntosh's anti-Tucker campaigns. Tucker said that Say McIntosh turned against him after the denial of clemency to Charles Hayes. Tucker identified McIntosh fliers calling Tucker a liar, murderer, and thief, saying Tucker had a witness killed, and alleging that Tucker had stolen "all that good money that was meant for blacks to go into business for themselves."

There was also evidence about the timing of Johnson's arrangements at the Hotze House, the bed and breakfast where Johnson and Hayes had a reception after their marriage. Johnson had made arrangements in January 1996 with the

Hotze House for a wedding and reception on March 9, 1996, but during the trial she changed the reservation to March 29, which was when the reception actually occurred (after the March 14 wedding).

After the 1998 hearing, the district court found that Johnson was not dishonest in failing to identify Hayes in response to the question about family members charged with crime:

> Johnson did not believe that living as a "family" constituted a family. As Johnson stated, it takes a marriage to make a family. Johnson testified credibly, in the Court's opinion, that Question 39 concerned only family members and that Charles Hayes did not fall into that category because they were not married.

36 F. Supp. 2d at 1115. The court also found that "Johnson was not being dishonest or intentionally deceiving the litigants or the Court when she did not respond to the Court's requests that the jurors disclose anything that could have any bearing on their partiality." Id. Furthermore, the court found that Tucker had failed to show Johnson had actual bias against him. Id. at 1116. The court found that there was no evidence that Johnson harbored negative feelings toward Tucker, and Hayes testified that he harbored none. Id. at 1115-16. Even assuming that Hayes did have a grudge against Tucker, the court found there was no evidence that he conveyed those feelings to Johnson. Id. at 1116. The court rejected Tucker's legal argument that the facts gave rise to implied bias, whether or not Johnson was actually biased against Tucker; the court held that implied or presumed bias was not a legal basis for relief. Id. at 1116. Having found no dishonesty and no actual bias, the court rejected Tucker's McDonough claim. Id. at 1115-17.

The court rejected the claim of improper communication with a juror because there was no evidence that any such communication occurred. Though Walker had signed an affidavit saying that Hayes and Johnson had discussed the trial "during the trial," Walker's testimony at the hearing negated the crucial time allegation: "At the hearing, Walker

could not recall whether Hayes said that the communications occurred during the trial." Id. at 1117. Walker's testimony also fell short of establishing that there had been communication of an improper nature: "Furthermore, Walker admitted that he did not know the content of any conversations between Hayes and Johnson and Hayes did not tell Walker that he had said anything improper to his wife during the trial." Id. Moreover, there was evidence that Johnson had not been subjected to any improper influence: "Johnson testified credibly, in the Court's opinion, that she did not have any conversations with Hayes, or any McIntosh family member, about the trial during the trial. The Court is persuaded that Johnson heeded the Court's regular admonition not to discuss the case with anyone." Id. at 1117-18.

I.

Tucker argues that the district court erred in rejecting his McDonough claim because the court's decision was based on erroneous findings of fact and because the court mistakenly thought it could only find bias if Johnson admitted bias against Tucker.

Findings of fact on a McDonough hearing are reviewed under the "clearly erroneous" standard of review. See United States v. Rouse, 111 F.3d 561, 573 (8th Cir. 1997). Honesty of the juror and actual bias are factual issues. See id.; Mack v. Caspari, 92 F.3d 637, 642 (8th Cir. 1996) (juror bias). The ultimate determination of whether a new trial is required is reviewed for abuse of discretion. United States v. Williams, 77 F.3d 1098, 1100 (8th Cir. 1996).

The Supreme Court discussed the meaning of the "clear error" standard of review in Anderson v. City of Bessemer City, 470 US. 564 (1985), our pole star on this question. Under Anderson, review for clear error requires not just deference to the fact finder's views, but a very specific level of deference:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it

> even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 573-74. We may reject the fact finder's choice between conflicting evidence only where there is something wrong with the choice. See id. at 574-75. Furthermore, when findings are based on determinations regarding the credibility of witnesses, the level of deference is even higher than the standard already described. Id. at 575. "[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." Id. This reasoning, though it certainly counsels a high level of deference, suggests three specific ways in which a finding based on credibility could be erroneous. First, the accepted testimony could be incoherent or facially implausible. See Taylor v. Howe, 225 F.3d 993, 1004, 1006, 1008 (8th Cir. 2000) (finding of no discrimination clearly erroneous in relying on testimony that was implausible). Second, the testimony could be contradicted by extrinsic evidence. Third, the finding itself could be internally inconsistent.

Tucker's attack on the district court's findings is primarily an attack on the district court's judgment that Johnson was credible. Therefore, the level of deference owed to the district court's findings is particularly high. However, Tucker argues that Johnson's testimony is self-contradictory and too implausible to be credited and that some of her testimony is contradicted by extrinsic evidence.

Tucker argues that Johnson minimized the extent of her relationship with Hayes in order to defend her failure to identify him in response to the question about family members charged with crime. First, Tucker contends that Johnson's testimony about the status of her wedding plans at the time of voir dire was contrary to fact. In the 1996 hearing, she said that

she and Hayes became engaged in 1994 but had never set a date for their wedding. Tucker put on evidence in the 1998 hearing that Johnson had made a reservation at the Hotze House in January 1996 for a March 9 wedding and reception. Johnson also admitted that at the time of voir dire, she had bought a ring for the wedding. However, the Hotze House reservation lapsed in February, for nonpayment of the deposit, and was eventually rescheduled as a reception for March 29. The district court found that Johnson's plans for marriage "were not definite." 36 F. Supp. 2d at 1115. This finding is supported by Hayes's testimony Johnson had wanted to get married "several times" before they finally did so, but that he was "holding out." The extrinsic evidence does not so contradict Johnson's statements that the district court was obliged to find Johnson had been dishonest.

Even assuming Johnson's testimony about the status of her wedding plans was disingenuous, the whole question about the wedding plans is really subsidiary to the question of whether she was "virtually married" or part of a "family" with Hayes at the time of voir dire so that she knew her failure to identify him was misleading. On this question, the court considered Tucker's evidence that Johnson and Hayes lived together as a family, that they had a daughter together, and that they had bought a house together. 36 F. Supp. 2d at 1115. Tucker points out on appeal that Johnson agreed that at the time of voir dire she and Hayes were living in their home "as a family," they bought the house "as a family," and paid their bills "as a family." Despite this evidence, the court concluded that Johnson had satisfactorily explained her failure to include Hayes in her response to the question about family: "Johnson did not believe that living as a 'family' constituted a family. As Johnson stated, it takes a marriage to make a family. Johnson testified credibly, in the Court's opinion, that Question 39 concerned only family members and that Charles Hayes did not fall into that category because they were not married." Id. Again, Johnson's reconciliation of her various statements is not so implausible that the district court was obliged to find she was dishonest.

Tucker also attacks the district court's finding that

"Johnson was not being dishonest or intentionally deceiving the litigants or the Court when she did not respond to the Court's requests that the jurors disclose anything that could have any bearing on their partiality." Id. First, Tucker points out that Johnson had testified at the 1996 hearing that she did not know Hayes when he was in jail. At the 1998 hearing, Tucker's counsel introduced Johnson's testimony from her 1998 divorce proceedings in which she said she had known Hayes all her life. Moreover, Hayes testified that he met Johnson when she came with her sister to visit his brother and him in prison. The district court concluded that these contradictions did not show that Johnson was lying, but rather that she was using the word "know" in two different senses: "She 'knew of Hayes' but did not know him, in the sense of being friends or having conversations, until after he was released from prison. Her distinction is rational, not farfetched." 36 F. Supp. 2d at 1116. Neither Johnson's reasoning, nor the court's acceptance of it, is too implausible to support a finding that Johnson honestly believed she had no facts in her background of the sort the court was asking her to reveal.

Tucker points out that Johnson testified in the 1996 hearing that she "knew of Say McIntosh, but did not "know" him. At the 1998 hearing, Tommy McIntosh testified that Johnson knew Say McIntosh when Tommy was dating her, before her marriage. Tommy did not say how well Johnson knew his father, and so his testimony is not necessarily at odds with hers. And, more to the point, Johnson said that she was not interested in Say McIntosh's political activities, testimony which the district court believed based on demeanor and context. See 36 F. Supp. 2d at 1117.

Tucker also infers dishonesty from Johnson's testimony at the 1996 hearing that she could not say whether Hayes was still in touch with Tommy McIntosh. At the 1998 hearing, Johnson seemingly acceded to the statement that Tommy McIntosh and her husband were in "constant contact." However, this testimony must be considered in light of the fact that Tommy McIntosh was living in Nashville, not Little Rock, during the trial. When questioned more specifically about contact between Tommy and Hayes, Johnson said Tommy had

been to her house to see Charles probably once or twice before the trial. Neither Hayes nor Tommy told of any more extensive contacts between the two men, and both indicated that Johnson was inside while they visited outside the house. This evidence does not compel a finding that Johnson was dishonest.

Tucker also attacks the district court's finding that Johnson was not well informed on political matters, see id. at 1117, which he points out is in some tension with her statement that she was well informed on local news events. Johnson said that she did not read the newspapers every day, and she watched the news "occasionally." She said she had not been politically active in 1996 or before. Even if there is a discrepancy between the testimony and finding, it is necessarily minor and tangential, because the primary questions were what Johnson knew about her husband's dealings with Tucker and whether, with such knowledge as she had, she was obliged to inform the court about those dealings. Her direct testimony on this issue was that she had no knowledge whatsoever of the circumstances under which Hayes regained his freedom and she never became aware of her husband's request for clemency until Tucker's new trial motion was filed. Her general interest in the news is not particularly relevant in assessing her relation with Say McIntosh, because she testified she was aware of his political activities, but not interested in them.

In sum, under the rigorous standard of Anderson v. City of Bessemer City for review of findings of fact, we must affirm the district court's finding that Johnson's answers at voir dire were honest. Thus, Tucker's McDonough claim fails at the first step.

Tucker argues on this appeal that he could be entitled to a new trial without a finding of juror dishonesty, by simply proving bias. To divine the law on this question in our circuit requires careful study. Compare Cannon v. Lockhart, 850 F.2d 437, 440 (8th Cir. 1988) (concluding, after counting votes in the various opinions in McDonough, "It would thus appear that a juror's dishonesty is not a predicate to obtaining a new trial. The focus is on bias.") with United States v. Wright, 119 F.3d 630, 636 (8th Cir. 1997) (after court concludes juror answered

question truthfully, McDonough inquiry is over); and United States v. Williams, 77 F.3d 1098, 1100-01 (8th Cir. 1996) (without misleading answer, new trial not warranted). Cf. Skaggs v. Otis Elevator Co., 164 F.3d 511, 516 (10th Cir. 1998) ("The advent of the [McDonough] test did not eliminate a litigant's broader historic right to prove actual or implied juror bias."), cert. denied, 528 U.S. 811 (1999); Fitzgerald v. Greene, 150 F.3d 357, 362-64 & n.3 (4th Cir. 1998) (holding Sixth Amendment claim can rest on bias alone, but reserving question of whether McDonough plurality allows grant of new trial for inaccurate answer, concealing bias, regardless of dishonesty); Dyer v. Calderon, 151 F.3d 970, 979 n.12 (9th Cir. 1998) (en banc) ("Because we conclude that Freeland lied, we need not decide whether dishonesty is a necessary predicate to a finding of juror bias.") However, this case does not require us to settle the question of whether actual bias alone would warrant a new trial, because the district court found that Tucker "failed to show actual bias on the part of Johnson." 36 F. Supp. 2d at 1116. The finding that Johnson had no duty to respond differently to the voir dire question about bias also tends to establish that she had no bias in fact. Since we have already upheld the finding that she did not conceal bias, Tucker's argument that she actually was biased was substantially decided before we arrived at it; no nuance between the two questions convinces us that the district court erred in finding that Tucker did not show actual bias.

Tucker argues that the district court made a legal error in supposing that Johnson would have had to agree that she was biased before the court could have found that she was. The district court's opinion betrays no such misconception.

Although Tucker's brief does not develop a detailed argument, he at least alludes to the idea of presumed or implied bias--that a juror may have such a close relation to a case that he or she should be deemed biased without regard to subjective state of mind or "actual bias." See generally McDonough, 464 U.S. at 556-57 (Blackmun, J., concurring) and 558 (Brennan, J., concurring in judgment). In the context of jurors sitting on consecutive related cases, we have held that only actual bias of a juror violates the Sixth Amendment. See Johnson v.

Armontrout, 961 F.2d 748, 751-53 (8th Cir. 1992) (citing Smith v. Phillips, 455 U.S. 209, 215 (1982)); see also Goeders v. Hundley, 59 F.3d 73, 75-77 (8th Cir. 1995) (failure to strike juror not ineffective assistance where juror not actually biased; court rejects claim that habeas petitioner was harmed by presence of juror whose bias could be presumed). However, in a recent habeas case, we stated that bias could be established "by proof of specific facts which show such a close connection to the facts at trial that bias is presumed." Fuller v. Bowersox, 202 F.3d 1053, 1056 (8th Cir.)(internal quotations omitted), cert. denied, 121 S. Ct. 489 (2000). Here, relying on habeas cases, the district court held as a matter of law that implied or presumed bias could not entitle Tucker to a new trial. 36 F. Supp. 2d at 1116. The habeas cases examine whether circumstances led to a violation of the petitioner's constitutional right, not whether those circumstances would have supported a grant of a new trial. But without resolving whether or not presumed bias can support a grant of a new trial in our circuit, we observe that the idea of presumed bias is reserved for extreme cases, such as when a juror is a close relative of a party or victim in the case. See United States v. Greer, 223 F.3d 41, 53 (2d Cir. 2000). In her concurrence in Smith v. Phillips, 455 U.S. 209, 222 (1982), Justice O'Connor listed extreme situations that would warrant a finding of implied bias: "Some examples might include a revelation that a juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." Johnson is not related to the facts or parties of this case in a manner that approaches such an extreme situation. Therefore, the district court did not err in denying Tucker's new trial motion.

We must affirm the district court's holding that Tucker failed to establish his right to a new trial based on juror misconduct at voir dire.

II.

Tucker also attacks the district court's assessment that there was no evidence of improper outside influence over

Johnson. We review a district court's decision on whether to grant a new trial because of outside juror contacts for abuse of discretion. See United States v. Pennington, 168 F.3d 1060, 1067 (8th Cir. 1999); United States v. Cunningham, 133 F.3d 1070, 1075 (8th Cir. 1998). The questions of whether there was improper outside contact and whether such contact was prejudicial are fact questions reviewed for clear error. See United States v. Thomas, 946 F.2d 73, 75-76 (8th Cir. 1991). But cf. Wolff v. Brown, 128 F.3d 682, 686 n.4 (8th Cir. 1997) (noting discrepancy in our cases as to whether we review finding of prejudice under clear error standard or merely give it "substantial weight").

Tucker suggests that Johnson may have been subjected to outside influence by overhearing Tommy McIntosh's statements to Hayes outside her house while she was indoors. There is no direct evidence of this. A new trial order entered on the basis of this theory would be questionable, at the least. But here, Tucker asks us to reverse a district court for not making this imaginative leap. Clearly, the district court acted within its discretion.

Nor is there other, more satisfactory evidence of misconduct. Tommy McIntosh's statement that he believed Johnson and Hayes must have talked because "[p]eople on juries talk to their husbands" is not a "reasonable inference," as Tucker would have it, but rather an unfounded opinion by someone with no personal knowledge of the facts. To credit Tommy McIntosh's sweeping opinion of juror conduct, we would have to repudiate the usual presumption that jurors follow the instructions of the court. See Francis v. Franklin, 471 U.S. 307, 324 n.9 (1989); United States v. Paul, 217 F.3d 989, 997 (8th Cir. 2000).

William Walker's testimony was conclusory to begin with, to the effect that Hayes said he had some discussion with Johnson about the case. On cross-examination, it became clear that Walker did not have any knowledge about two crucial facts: when the putative discussion took place and what was said. Without these facts, there is simply no way to tell whether the discussion Walker was describing was improper or not.

Moreover, Walker's credibility as a witness might be affected by his position as a Tucker political ally and business associate.

On the other hand, the only direct evidence on this subject is the testimony of Johnson and Hayes that they did not discuss the case during the trial, except perhaps immaterial statements about scheduling. Johnson testified, "I didn't discuss what went on in the courtroom." Hayes said to his knowledge, Johnson never broke her word not to talk about the trial.

The district court concluded on this record: "The Court is persuaded that Johnson heeded the Court's regular admonition not to discuss the case with anyone." 36 F. Supp. 2d at 1118. This finding is not clearly erroneous. We therefore need not progress further to examine whether any outside contacts were prejudicial. The district court did not abuse its discretion in denying Tucker's motion for a new trial based on outside juror contacts.

***

We affirm the district court's denial of Tucker's new trial motion, and it follows that we must affirm the conviction.

A true copy.

Attest:

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(2)

No. 00-1726

In The Supreme Court of the United States

JIM GUY TUCKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Tucker is entitled to a new trial based on alleged juror partiality where the juror was honest during *voir dire*, was not biased against Tucker, and was not subjected to any improper communication.

2. Whether a court must presume that a juror is biased as a matter of law even though the juror was unaware that her fiance had previously been denied executive clemency by the defendant.

3. Whether a court must presume that a juror is biased where her fiance's uncle was an outspoken political critic of the defendant but where the juror herself was not interested in the uncle's views and was not influenced by them and where the juror believed that the defendant had been "a good governor."

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Eighth Circuit's opinion deciding Tucker's first appeal is reported at 137 F.3d 1016 (Pet. App. 1-46). The district court's decision after remand is reported at 36 F. Supp. 2d 1110 (Pet. App. 47-62). The Eighth Circuit's opinion in the appeal after remand, from which Tucker seeks certiorari review, is reported at 243 F.3d 499 (Pet. App. 63-81).

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner Jim Guy Tucker was convicted in 1996 on charges of conspiracy and mail fraud. Alleging that a juror was biased against him, he now seeks a new trial. If the facts Tucker asserts in his Petition were true, his Petition might present a more substantial argument. But Tucker's Petition recites the facts as he alleges them, not as the district court found them. Tucker argued in the court of appeals that the district court's findings were clearly erroneous, but the court of appeals rejected that argument. Tucker has not asked this Court to review those findings, and even if he had, this Court would not do so absent some "extraordinary reason." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1982). Yet all of Tucker's arguments are based on his misrepresentation of the record.

1. On August 5, 1994, in response to then Attorney General Janet Reno's application under 28 U.S.C. § 592(c), the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels, appointed Kenneth W. Starr as independent counsel to represent the United States in investigating whether anyone had committed federal crimes arising out of the relationships of President and Mrs. Clinton, James B. McDougal, Whitewater Development Company, Inc., Madison Guaranty Savings and Loan Association, and Capital Management Services, Inc. *See* Order, *In re Madison Guaranty Savings & Loan Association*, Div. 94-1 (D.C. Cir. [Spec. Div.] Aug. 5, 1994). On October 18, 1999, after Independent Counsel Starr resigned, the court appointed Robert W. Ray as independent counsel. Order, *In re Madison Guaranty Savings & Loan Association*, Div. 94-1 (D.C. Cir. [Spec. Div.] Oct. 18, 1999).[1]

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[1] In preparing this brief in opposition, the Independent Counsel fulfilled his statutory obligation to "consult with the Department of

2. In the mid-1980s, Tucker was a lawyer in Little Rock and was active in politics and business. *See* Pet. App. 2-3. His conviction in this case resulted from a fraudulent scheme that he perpetrated in the fall of 1985 and spring of 1986 with James and Susan McDougal, who controlled a Little Rock savings and loan, Madison Guaranty Savings and Loan Association, and David L. Hale, who was a Little Rock municipal judge who also ran a small business investment company, Capital Management Services, Inc. *See* Pet. App. 1 & 2-3. Capital Management was supposed to lend funds to disadvantaged small businesses and was financed in substantial part by the Small Business Administration. *See* Pet. App. 3.

As part of the scheme, Hale's Capital Management made fraudulent loans to designees of Tucker and James McDougal. Tucker's conviction for mail fraud relates to a $150,000 loan to Castle Sewer and Water, a company of which Tucker owned two-thirds and an associate of James McDougal owned one-third. Pet. App. 4-5. Tucker submitted a false loan application to Capital Management, disguising the purpose for which the loan would be used and misrepresenting the company's assets. Pet. App. 4-5. Castle Sewer and Water purchased the sewer and water utility located in a real estate development owned by Madison Guaranty. Pet. App. 4. The $150,000 down payment for this purchase was made with the proceeds of the loan from Capital Management, and the remainder of the purchase price was financed by Madison Guaranty. Pet. App. 4.

Justice" regarding the Department's policies "respecting enforcement of the criminal laws." 28 U.S.C. § 594(f)(1). The views of the United States in this brief are consistent with the views expressed by the Department of Justice in *Boney v. United States*, No. 00-1372 (brief in opposition filed June 1, 2001) (certiorari sought where felon concealed conviction and served as juror).

3. a. The trial of Tucker and James and Susan McDougal began on March 11, 1996, and ended on May 28, 1996, with guilty verdicts returned against each defendant.[2] The trial involved the sitting governor of Arkansas and the business partners of the President of the United States; it generated substantial media attention. The district court therefore conducted a lengthy jury selection. Each prospective juror filled out a questionnaire, and the district court conducted four days of *voir dire*. During *voir dire*, Tucker's counsel asked each prospective juror to explain his or her feelings about Governor Tucker. Prospective juror Renee Johnson at first stated that she had no opinion, but when pressed, she answered "I guess he's been a good governor." Pet. App. 9. The questionnaire asked jurors whether they or any family members had been charged with a crime. Johnson answered affirmatively, but no party inquired as to the identity of the family member or otherwise questioned her response. Johnson was empanelled as one of the petit jurors.

At the conclusion of the government's case-in-chief, the Court granted a judgment of acquittal on four of the eleven counts against Governor Tucker. Pet. App. 2. The jury acquitted Governor Tucker of five of the remaining counts submitted to it, and convicted him on two counts: Count 1, which charged conspiracy in violation of 18 U.S.C. § 371,

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[2] Tucker was the defendant in another prosecution arising out of the government's investigation into Capital Management and Madison Guaranty. On June 7, 1995, a grand jury in Little Rock indicted Tucker, his lawyer, and his business partner for conspiring to impede the IRS's collection of substantial tax revenue. *See United States v. Tucker*, 78 F.3d 1313, 1316 (8th Cir. 1996) (reversing dismissal of indictment). Tucker and the other defendants eventually pleaded guilty. *See United States v. Tucker*, 217 F.3d 960, 961 (8th Cir. 2000) (remanding for further hearing on sentence of restitution).

and Count 12, which charged mail fraud in violation of 18 U.S.C. § 1341. Pet. App. 2.[3]

b. In July 1996, Tucker filed a motion for a new trial, claiming that the jury was biased. He asserted that (1) during *voir dire* Juror Renee Johnson had concealed her bias against Tucker; and (2) during the trial, Johnson had been improperly influenced by family members of her husband, Charles Hayes, whom she had married during the trial. *See* Pet. App. 15. Tucker alleged that as a state prisoner, Hayes had twice been denied executive clemency, and alleged that Hayes was the nephew of Robert "Say" McIntosh, an outspoken critic of political figures, including Governor Tucker. Say McIntosh had demonstrated against Tucker during his trial, and Say's son Tommy McIntosh had also criticized Tucker. Pet. App. 11-12 & 50.

On August 1, 1996, the district court held a brief hearing on Tucker's claims regarding juror bias, and concluded that Tucker had failed to show that Johnson was biased against him or that there had been any improper extraneous communication with the jurors.

c. In his first appeal, Tucker made two arguments that are relevant to his petition: First, he claimed that under *McDonough Power Equip., Inc., v. Greenwood*, 464 U.S. 548 (1984), he was entitled to a new trial, or at least a remand for a further hearing. Under *McDonough Power*, Tucker had to show that Johnson had been dishonest at *voir dire* and that had the true facts been known, she could have been struck for cause. *See* Pet. App. 16-17.[4] Second, Tucker asserted that

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[3] Tucker was sentenced to four years probation, including 18 months home confinement, $150,000 in restitution, and a $25,000 fine. (Tucker's term of probation ended on August 19, 2000.)

[4] After stating the two-part test, the Court in *McDonough Power* stated that "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." 464 U.S. at 556. Thus, the Eighth Circuit stated that a

the district court had erred by preventing him from proving that Johnson had been subject to outside influence during the trial. Pet. App. 23. The court of appeals concluded that Tucker was entitled to a full hearing on each of his claims.

4. a. On remand, the district court held a three-day evidentiary hearing. Tucker called 11 witnesses, including Renee Johnson and her husband, Charles Hayes. The district court found that Johnson had been honest during *voir dire* and found that she had not been biased against Tucker. Pet. App. 57. The district court also found that the evidence did not show that Hayes or anyone else had improperly communicated with Johnson or had tried to influence her. Pet. App. 61-62. The court thus did not address whether there was prejudice from the alleged improper communication. Also, the court found that as to the political activities of Say McIntosh, "there is no evidence that [Johnson] paid any attention to Say McIntosh's fliers or criticism of Tucker or that she was in any way influenced by his opinions." Pet. App. 57.

The evidence adduced at the hearing and the district court's findings of fact are as follows:

b. Prior to *voir dire*, each prospective juror completed a jury questionnaire. Pet. App. 48. Question 39 asked if "You or any member of your family have ever been charged with a crime?" to which Johnson answered "yes." The questionnaire then asked what the charge was, to which Johnson responded "drug conviction." Finally, the question asked how the case ended, to which Johnson answered "Guilty (serving 4 years)." *Id.* At the hearing, Johnson identified the family member to whom she had referred in Question 39 as Brian Hayes, her sister's husband. *Id.* Brian Hayes is the brother of Charles

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movant must show that the juror was biased to obtain a new trial. Pet. App. 16-17; *cf. Tinsley v. Borg*, 895 F.2d 520, 526 (9th Cir. 1990) (denial of new trial where juror not actually biased).

Hayes. Johnson testified that in response to this question about family members, she had identified Brian's conviction but not Charles's because she and Charles were not married but that Brian was her brother-in-law. Pet. App. 56. In concluding that Johnson had not intentionally concealed her relationship with Charles Hayes or his family, the district court found it significant that Johnson had identified Charles's brother. Pet. App. 57.

At the time she filled out the questionnaire and at the time of *voir dire*, Johnson was living with Charles Hayes, who was the father of her three-month old daughter. Pet. App. 48. They had been engaged since 1994, but their wedding plans were not definite, and Hayes had been "holding out" on Johnson—that is, he had refused to marry her although that was her desire. Pet. App. 70. Some time in February 1996, Johnson reserved a room for a wedding reception to be held on March 9, but she did not pay the required deposit, and the reservation lapsed. Pet. App. 55-56. On March 14, 1996, the fourth day of the Tucker and McDougal trial, during the juror's lunch break, Johnson married Hayes. Pet. App. 48.

c. Before Hayes and Johnson began dating, Hayes had been in prison. In 1989, Charles Hayes, Tommy McIntosh, and Maurice Crawford, who were all cousins, were convicted in state court on cocaine charges. Hayes and Crawford were sentenced to 40 years imprisonment, while Tommy McIntosh was sentenced to 50 years. In June 1991, Hayes filed a petition with the governor of Arkansas for executive clemency. (He had also filed a petition for writ of habeas corpus in federal district court.) More than a year later, on July 20, 1992, Lieutenant Governor Tucker, as acting governor, denied Hayes's clemency petition. *See* Pet. App. 49.[5]

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[5] Tucker was acting governor because Governor William Jefferson Clinton was outside the state campaigning for the presidency.

Shortly after his clemency petition was denied, on August 7, 1992, a federal magistrate judge granted Hayes's petition for a writ of habeas corpus, finding that Hayes's counsel had a conflict of interest that Hayes had not knowingly waived. The state appealed, and Hayes remained incarcerated until April 28, 1993, after the Eighth Circuit affirmed the grant of the writ and the state decided not to retry Hayes. *See* Pet. App. 52 n.7; *Hayes v. Lockhart*, 989 F.2d 505, 1993 WL 91269 (8th Cir. 1993) (unpublished).

d. In January 1993, shortly before the Eighth Circuit affirmed the grant of the writ, Hayes, Tommy McIntosh, and Crawford again sought executive clemency. Pet. App. 49. By this time, Tucker was the governor, having assumed that position after Governor Clinton resigned to assume the presidency. While Governor Tucker was in Washington, D.C., attending President Clinton's inauguration, state Senator Jerry Jewell was acting governor. William Walker, a member of the Arkansas legislature, advocated clemency for the three men, and Jewell commuted Tommy McIntosh's sentence to time served. Pet. App. 49. Tucker's staff prevented Jewell from granting clemency to others by informing him that a sentence could not be commuted if the files were not in his office. Pet. App. 50.

Walker told Hayes that he had not had his sentence commuted because Tucker's chief of staff did not make the file available. Pet. App. 50. According to Walker, Hayes was upset by this, and thought it was unfair. Pet. App. 50. The district court found that Walker's assertions on this point were "somewhat suspect" because the details of his testimony were inconsistent with other assertions. Pet. App. 58 n.12. The district court also noted that Walker's political and business associations with Tucker, as well as the government's questioning of him regarding Castle Sewer and Water during the investigation, indicated that Walker was not a "completely disinterested witness." Pet. App. 58 n.12.

Hayes, on the other hand, testified that he had not expected to receive clemency and that he had no animosity toward the person who had denied him clemency. Pet. App. 53. Most important, Johnson and Hayes testified that they did not discuss Hayes's incarceration or his efforts to obtain release. Both stated that Hayes never expressed to Johnson any ill feelings toward Tucker. The district court found this testimony credible. Pet. App. 53-54.

e. In the affidavit that he submitted after the trial, William Walker asserted that Hayes had stated to him that Hayes and Johnson had discussed the trial *during the trial*. Pet. App. 11. At the hearing on remand, however, Walker admitted that the statement "during the trial" was added to the affidavit in response to questioning by Tucker or Tucker's counsel. Pet. App. 60 & n.13. Walker stated that he could not remember whether he had heard Hayes say that Hayes had discussed Tucker's trial with Johnson during the trial. Pet. App. 60. And Walker admitted that he did not know the substance of any discussion between Hayes and Johnson. Pet. App. 61.

Tommy McIntosh testified that he believed that Johnson and Hayes had discussed the substance of the proceedings during the trial. He stated, however, that he assumed that jurors routinely discuss with others the substance of a trial and that jurors would not obey a judge's instruction not to discuss a trial. Trans. at 432-34 (12/4/98 Hearing). But when asked if he would be speculating if he said Hayes and Johnson had discussed the substance of the trial, he responded, "That's all I would be doing." Trans. at 434 (12/4/98 Hearing).

Hayes and Johnson both testified that during the trial they never discussed the substance of the case. Trans. at 158 (Johnson) & 187–88 (Hayes) (12/3/98 Hearing). The district court concluded that Johnson and Hayes had not improperly discussed the proceedings during the trial. Pet. App. 61. And the district court found credible Johnson's statements that she

was not concerned with Say McIntosh's political activities. *See* Pet. App. 57.

5. In his second appeal, Tucker asserted that the district court's fact finding was clearly erroneous, principally arguing that the court erred in finding Johnson credible. *See* Pet. App. 74. Tucker argued that under the facts as the district court should have found them, he was entitled to a new trial for two reasons. First, he asserted that he satisfied the test from *McDonough Power* because Johnson had allegedly lied at *voir dire*, was biased against him, and would have been struck for cause had the truth been known. *See* Pet. App. 73. Second, Tucker asserted that Johnson and Hayes had improperly communicated during the trial and so he was entitled to a new trial under *Remmer v. United States*, 347 U.S. 227 (1954). *See* Pet. App. 79-80.

The court of appeals reviewed the district court's fact finding under the standard announced by this Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). The court of appeals reviewed all of Tucker's challenges to the district court's fact finding and concluded that those findings were not clearly erroneous. *See* Pet. App. 77 (no dishonesty), 78 (no actual bias) & 81 (no outside influence).

The court of appeals also noted that Tucker's brief alluded to presumed juror bias, although he had developed no detailed argument regarding that issue. Pet. App. 78. The Eighth Circuit nonetheless addressed the issue and concluded that the facts here did not resemble any "extreme circumstances" suggested in Justice O'Connor's concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 222 (1982), such that bias could be presumed as a matter of law. Pet. App. at 78-79.[6]

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[6] It is difficult to understand Tucker's complaint that the analysis of the court of appeals on this issue was "cursory at best." Pet. at 19 n.12. Tucker apparently believes that the court of appeals was required to

ARGUMENT

The challenges that Tucker raised below involved well-settled legal tests that the court of appeals correctly found were not satisfied by the facts in this case. Tucker now raises arguments not raised below, which the lower court never addressed, and posits circuit conflicts where none exist. Moreover, the arguments in Tucker's Petition would require this Court to fashion a legal rule based on the peculiar facts of this case. Such a rule would have little or no general application. A writ for certiorari is therefore inappropriate. *See* Sup. Ct. R. 10; *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("ordinarily, this Court does not decide questions not raised or involved in the lower court"); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (Taft, C.J.) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.) ("We do not grant a certiorari to review evidence and discuss specific facts.").

1. Tucker asserts that certiorari is appropriate so that this Court can resolve a conflict among the circuits regarding presumed juror bias. Pet. at 15-20. There is no conflict.

a. In *Smith v. Phillips*, 455 U.S. 209 (1982), this Court addressed the issue of whether a juror could be presumed biased as a matter of law. This Court stated that it had "long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215. Justice O'Connor joined the

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exhaustively analyze the issue even though he had not presented it for consideration.

majority opinion, but wrote a concurrence addressing the issue of presumed juror bias:

> [I]n certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice. While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that a juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of "no bias," the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.

455 U.S. at 222 (O'Connor, J., concurring).[7]

Two years later, in *McDonough Power Equip., Inc., v. Greenwood*, 464 U.S. 548 (1984), this Court addressed a claim similar to the one raised in this case. In a civil case, the plaintiff sought a new trial, alleging that a juror had answered a question at *voir dire* dishonestly. This Court held that in such a situation, a party is entitled to a new trial only where the party could

> first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

464 U.S. at 556.

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[7] Three justices dissented because they would have presumed bias on the facts there. 455 U.S. at 224 (Marshall, J., dissenting, joined by Brennan and Stevens, JJ.).

Justice Blackmun, joined by Justices Stevens and O'Connor, concurred in the opinion, but wrote separately to address how a party could establish juror bias in other situations. The concurring justices agreed that "the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." 464 U.S. at 556. The concurring justices also stated that without regard to whether a juror is honest or dishonest, a party may still "demonstrate actual bias, or, in exceptional circumstances, that the facts are such that bias is to be inferred." 464 U.S. at 556-57.[8]

Based on the concurring opinions in *Smith* and *McDonough Power*, the lower federal courts have often applied the "extreme situations" or "exceptional circumstances" analysis to determine whether a juror should be presumed biased as a matter of law. This analysis is obviously not susceptible to bright line rules in its application. The cases that Tucker cites in his Petition do not demonstrate that there is a conflict among the circuits but show rather that each case must be analyzed on its particular facts.

b. Tucker first asserts that there is a conflict among the circuits as to whether presumed bias may ever be asserted as grounds for a new trial. He cites only one case, *Goeders v. Hundley*, 59 F.3d 73 (8th Cir. 1995), as an example of a circuit that has held that it may not be so asserted. But in this case, the Eighth Circuit noted that its more recent decision conflicted with *Goeders*. Pet. App. 79. In *Fuller v. Bowersox*, 202 F.3d 1053, 1056 (8th Cir.), *cert. denied*, 121

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[8] Two other justices concurred in the judgment and would have applied a rule that "to be awarded a new trial, a litigant should be required to demonstrate that the juror incorrectly responded to a material question on *voir dire*, and that, under the facts and circumstances surrounding the particular case, the juror was biased against the moving litigant." 464 U.S. at 557-58 (Brennan, J., concurring, joined by Marshall, J.).

S.Ct. 489 (2000), the Eighth Circuit had held that a habeas petitioner could show bias "by proof of specific facts which show such a close connection to the facts at trial that bias is presumed." The court below declined to decide whether *Goeders* or *Fuller* was the controlling circuit precedent because it concluded that even if presumed bias were a ground for a new trial, Tucker had failed to make out such a claim: "Johnson is not related to the facts or parties of this case in a manner that approaches such an extreme situation [as described in Justice O'Connor's concurrence in *Smith*.]" Pet. App. 79.

Tucker had the benefit of the standard he is now advocating even though he did not advocate it in the court below. He did not prevail because the court of appeals concluded that he failed to satisfy the standard on the facts. Given the Eighth Circuit's most recent precedent, there is no reason to assume, as Tucker asserts, that the Eighth Circuit would in the future hold that some other litigant could not obtain a new trial by showing such exceptional circumstances. Tucker has failed to present an issue suitable for this Court's review.

c. Tucker cites several cases for the proposition that "[c]onflicts exist on the standards to be employed in determining implied bias." Pet. at 17. The apparent conflict exists only because Tucker's petition creates it by misrepresenting the holdings of the cases that he cites.

Contrary to Tucker's assertion, Pet. at 17, the courts do not differ over whether juror dishonesty is a factor in the presumed bias analysis. Rather, the lower courts have all recognized that, depending on the facts of the case, dishonesty may or may not be a factor. *See United States v. Masiarczyk*, 243 F.3d 543, 2001 WL 30066, *8 (4th Cir. 2001) (unpublished) (even if litigant cannot show a dishonest answer, "'it remains within the trial court's option, in determining whether a jury was biased, to order a post-trial

hearing at which the movant has the opportunity to demonstrate actual bias, or in exceptional circumstances, that the facts are such that bias can be inferred.'") (quoting *Fitzgerald v. Greene*, 150 F.3d 357, 362-63 (4th Cir. 1998)); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991) ("[the juror's] dishonesty, of itself, is evidence of bias"); *Hunley v. Godinez*, 975 F.2d 316, 320 (7th Cir. 1992) ("While the juror's intentional concealment was a factor in the *voir dire* cases, the critical inquiry was whether the juror had a connection with the case in which the potential for substantial emotional involvement, adversely affecting impartiality[,] was inherent.") (internal quotation omitted). Contrary to Tucker's assertion that the lower courts disagree on the proper legal analysis, in truth the courts have correctly recognized that "each case must turn on its own facts." *Smith*, 455 U.S. at 222 (O'Connor, J., concurring). There is no conflict.

Tucker also misrepresents the prior case law in an attempt to show a conflict among the courts of appeals as to the relation between the implied bias analysis and the *McDonough Power* test. Pet. at 17. Tucker cites only two cases: *United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984), and *Skaggs v. Otis Elevator Co.*, 164 F.3d 511 (10th Cir. 1998), *cert. denied*, 528 U.S. 811 (1999). In *Perkins*, in analyzing the second prong of the *McDonough Power* test, the court of appeals stated that "Actual bias may be shown in two ways: 'by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed.'" 748 F.2d at 1532 (quoting *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976)). The *Skaggs* court analyzed its own prior case law where it had recited the rule using language identical to that in *Perkins*, and concluded that the prior statement of the rule was somewhat confusing, but that there was no conflict. *See* 164 F.3d at 516 n.3. Tucker has not demonstrated why this Court is required to resolve a conflict that the court of appeals has concluded does not exist.

d. Tucker also misrepresents a supposed conflict regarding the scope of the exceptional circumstances analysis. He asserts that the Eighth Circuit in this case held that exceptional circumstances can be shown only where a juror is "related to [the] facts or parties of the case before the court." Pet. at 18 (internal quotation omitted). The Eighth Circuit actually held that it would not presume bias because "Johnson is not related to the facts or parties of this case in a manner that approaches such an extreme situation [as described in Justice O'Connor's concurrence in *Smith*.]" Pet. App. 79.

Tucker also asserts, Pet. at 18, that the Eighth Circuit's opinion conflicts with the analysis of the Ninth Circuit in *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (*en banc*). It does not. In *Dyer*, the court granted a new trial where "the record conclusively establishe[d] that [the juror] lied, and lied repeatedly" regarding potential sources of bias. 151 F.3d at 981. In this case Johnson honestly answered questions during *voir dire* and concealed no source of bias. The different results are driven by the strikingly different facts, not by any different understanding of the law.

Moreover, this case is inappropriate for the Court's review of this issue because the Eighth Circuit correctly decided that the facts here were not so extreme that Johnson should be presumed as a matter of law to be biased against Tucker. Although Johnson's fiance had been a state prisoner who had twice had his clemency petition denied, the fiance never discussed his clemency petitions with Johnson, and never expressed any negative feelings toward Governor Tucker. And while Johnson's fiance was the nephew of an outspoken critic of political figures, including Governor Tucker, Johnson was not concerned with those opinions nor was she influenced by them. She stated that she considered Tucker to be a good governor. Contrast *Dyer*, 151 F.3d at 984 (juror's repeated perjury, including concealing that her brother had been murdered similarly to the victim in that case, "add[ed]

up to that rare case where we must presume juror bias."); *Hunley v. Godinez*, 975 F.2d at 319 (new trial ordered where evidence of guilt was weak and "the burglary [of the jurors' hotel rooms during deliberations] placed the jurors in the shoes of the victim just before she was murdered").

2. Tucker asserts that the Eighth Circuit's decision conflicts with the decisions of this Court in three ways. Tucker's first two arguments present legal claims that he did not raise below and which the court of appeals did not decide. His third argument misrepresents the record and depends on the conclusory assertion that the court of appeals failed to properly analyze whether the district court's fact finding was clearly erroneous.

a. Tucker's first argument begins with the well settled rule that "[a]ppellate review includes determining whether 'fact-finding was . . . affected by erroneous legal principles.'" Pet. at 21 (quoting *Strickland v. Washington*, 466 U.S. 668, 698 (1984)). But with no support Tucker then leaps to the conclusion that the lower courts required him to prove his constitutional claim "beyond a reasonable doubt" and he asserts that "this case raises the constitutional question of the appropriate standard of review in juror impartiality cases." Pet. at 21. Tucker's second argument is that the court of appeals erred in "not reviewing the district court's application of any standard *de novo*." Pet. at 23.

Tucker never argued to the court of appeals that the district court had applied an improper standard nor that it should apply a standard other than clear error. Thus, the court of appeals never addressed these issues. Because these issues were not raised or addressed below, this Court should not grant certiorari to review them. *See, e.g., Youakim*, 425 U.S. at 234; *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (a question presented in petition but not raised in court of appeals is not properly before the Court); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues

are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

The court of appeals reviewed the district court's findings for clear error because Tucker had argued that the findings were clearly erroneous. The court of appeals correctly relied on *Anderson v. Bessemer City*, 470 U.S. 564 (1985), for the appropriate standard when reviewing for clear error. Tucker's reliance on *Ornealas v. United States*, 517 U.S. 690 (1996), Pet. at 24, is misplaced. In *Ornealas*, "the facts [were] not disputed." 517 U.S. at 691. This Court held that a court of appeals must review *de novo* a district court's finding of reasonable suspicion or probable cause, but then "hasten[ed] to point out that a reviewing court should take care . . . to review findings of historical fact *only for clear error* . . . ." 517 U.S. at 699 (emphasis supplied). The Eighth Circuit's decision accords fully with *Ornealas*.

b. Tucker also argues that the Eighth Circuit erred by "abjectly deferring" to the district court's fact finding. Pet. at 25. He cites three supposed errors: (1) failing to evaluate credibility under all the factors set out in *Anderson v. Bessemer City*; (2) improperly deferring to testimony prompted by leading questions; and (3) refusing to review the issues under a totality of the circumstances test.

The court of appeals properly applied the analysis from *Anderson v. Bessemer City*. The court thoroughly analyzed Tucker's challenges to the district court's findings but found them wanting. Pet. App. 73-77 & 79-81. Tucker asserts that the court of appeals failed to apply all of the *Anderson* factors, Pet. at 27, but he does not state which factor was not applied, or why, if it were applied, it would demonstrate that the district court's findings were clearly erroneous. Similarly, although Tucker argues that the court of appeals should have applied a "totality of the circumstances test," he did not make this argument below and he does not explain how such a test might have changed the outcome.

Tucker's argument regarding supposedly leading questions misrepresents the record in this case. Tucker describes the district court's decision as follows:

> The district court found credible Johnson's "testimony" that "only marriage makes a family." 36 F. Supp. 2d at 1115, App. 56. The court did not disclose in its opinion that these words were put in Johnson's mouth by the leading question of the Independent Counsel. The court also did not attempt to reconcile this finding with Johnson's testimony that she lived with Hayes and their child "as a family" and that he was closer to her at the time of *voir dire* than most members of her immediate family.

Pet. at 9-10. Tucker's Petition failed to disclose that the words "as a family" were part of his counsel's leading question. *See* Trans. at 179 (12/3/98 Hearing). To the extent that the government's question was leading, it was appropriate because it was asked on re-cross examination.

Tucker misrepresents the record by suggesting that the government rather than Johnson herself had first alluded to the significance of marriage in answering the question of who was a family member. When Tucker's counsel questioned Johnson's failure to report Charles Hayes's conviction in response to Question 39, Johnson stated: "It said family member. I said Brian. That was before I knew Charles. Me and Charles was not married. Brian was my brother-in-law." Trans. at 179 (12/3/98 Hearing). Thus, it was entirely understandable for counsel for the government subsequently to ask "Did it take a marriage to make a family in your mind?" to which Johnson responded "Yes." Trans. at 180 (12/3/98 Hearing).

Moreover, Tucker fails to acknowledge the district court's finding that "Johnson testified credibly, in the Court's opinion, that Question 39 concerned only family members and that Charles Hayes did not fall into that category because

they were not married." Pet. App. 56. This finding most clearly supports the district court's conclusion that Johnson had been honest, but Tucker's Petition does not even address it.

3. Tucker asserts that this case raises the constitutional issue of when a presumption of prejudice is triggered by improper contact with a juror. Pet. at 28 (relying on *Remmer v. United States*, 347 U.S. 227 (1954)). The district court found that there had been no improper communication with or improper influence on Johnson. Thus, the court did not have to decide whether any contact was prejudicial. The court of appeals held that this finding was not clearly erroneous, so it too never reached the issue of prejudice. Because Tucker failed to show that the alleged communications had occurred, whether such alleged communications were prejudicial is not at issue.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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